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Attorney for Defendant
UBS FINANCIAL SERVICES INC.
(improperly pled as "UBS Financial Services, Inc.")

**UNITED STATES DISTRICT COURT**

**SOUTHERN DISTRICT OF CALIFORNIA**

| | |
|---|---|
| GAIL STRUTHERS, an individual,<br><br>Plaintiff,<br><br>v.<br><br>UBS FINANCIAL SERVICES, INC., a corporation; and DOES 1 through 10, inclusive,<br><br>Defendants. | CASE NO. 08cv1381 H (JMA)<br><br>Judge Marilyn L. Huff<br><br>**DEFENDANT UBS FINANCIAL SERVICES INC.'S NOTICE OF MOTION AND MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATIONS OF JENNIFER HOWARD AND STEPHEN D. BIRD IN SUPPORT OF THEREOF**<br><br>**DATE: October 6, 2008**<br>**TIME: 10:30 a.m.**<br>**CRTR: 13** |

**TO PLAINTIFF GAIL STRUTHERS AND TO HER ATTORNEYS OF RECORD:**

**PLEASE TAKE NOTICE THAT** on October 6, 2008 at 10:30 a.m. or as soon thereafter as the matter may be heard before the Honorable Marilyn L. Huff, in Courtroom 13, of the above-entitled Court, 940 Front Street, San Diego, CA

92101-8900. Defendant UBS Financial Services Inc. (improperly pled as "UBS Financial Services, Inc.") ("Defendant") will and hereby does move for an order compelling arbitration and dismissing or staying all causes of action alleged in Plaintiff's First Amended Complaint.

This motion is based on the Federal Arbitration Act ("FAA"), 9 U.S.C. §§1 *et. seq.,* New York CLS Civil Practice Law and Rules §7501 and the California Code of Civil Procedure §§1281.2 and 1281.4, and is made on the grounds that the First Amended Complaint, and each and every cause of action contained therein, is subject to binding arbitration. Defendant has requested that Plaintiff stay or dismiss this action, but Plaintiff has refused to do so. Defendant has no other remedy but to compel arbitration and seek a dismissal or stay of these proceedings under 9 U.S.C. §3, pending resolution of the arbitration proceedings.

This motion is also based on the Notice of Motion and Motion, the Memorandum of Points and Authorities attached hereto, the declarations of Jennifer Howard and Stephen D. Bird, all papers and records on file herein, and on all oral and documentary evidence as may be presented at or before the time of the hearing on this matter.

DATED: September 8, 2008

EPSTEIN BECKER & GREEN, P.C.

By: ______________________________
James A. Goodman
Kathryn T. McGuigan

Attorneys for Defendant
UBS FINANCIAL SERVICES INC.
(improperly pled as "UBS Financial Services, Inc.")

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| GAIL STRUTHERS, an individual,<br><br>Plaintiff,<br><br>v.<br><br>UBS FINANCIAL SERVICES, INC., a corporation; and DOES 1 through 10, inclusive,<br><br>Defendants. | CASE NO. 08cv1381 H (JMA)<br><br>Judge Marilyn L. Huff randomly assigned<br><br>**DEFENDANT UBS FINANCIAL SERVICES INC.'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO COMPEL ARBITRATION**<br><br>**DATE: October 6, 2008**<br>**TIME: 10:30 a.m.**<br>**CRTR: 13** |

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# MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION

This action arises from the employment of Plaintiff Gail Struthers ("Struthers" or "Plaintiff") with UBS Financial Services Inc. ("UBSFS" or "Defendant"). Struthers has signed two arbitration agreements which govern the subject matter of her claims and which require her to arbitrate her claims.

Struthers signed a promissory note ("the Note") with UBSFS which provided that the parties would arbitrate all claims arising out of her employment. Struthers also executed a Uniform Application for Securities Industry Registration or Transfer ( "Form U-4") in which she agreed to arbitrate all disputes that arose out of her employment that were subject to arbitration under the rules of the Self-Regulatory Organizations ("SRO") with which she registered.

Struthers' First Amended Complaint ("FAC") contains eight causes of action, all of which relate to her employment with UBSFS: (1) intentional misrepresentation; (2) negligent misrepresentation; (3) violation of Struthers' rights under the Fair Employment and Housing Act ("FEHA") for disability discrimination and sexual harassment; (4) invasion of privacy; (5) intentional infliction of emotional distress; (6) breach of the implied covenant of good faith and fair dealing; (7) partial rescission of the Note; (8) unlawfully preventing employment by misrepresentation. The same claims alleged in the FAC have been previously asserted by Struthers in a Counter-Claim in a pending arbitration before the Financial Industry Regulatory Authority ("FINRA"). Struthers moved to stay the FINRA arbitration and that motion has been denied by the FINRA panel. Plaintiff, however, continues to refuse to dismiss or stay her FAC.

As shown below, the Court must dismiss or stay Plaintiff's action pending the outcome of arbitration based on the arbitration agreements she executed and to prevent the same claims from being litigated in different forums which may lead to inconsistent results.

## II. FACTUAL BACKGROUND

Plaintiff worked for Defendant as a Financial Advisor ("FA") from approximately February 16, 2006 to May 15, 2007 in Defendant's branch office in Carlsbad, California. (Declaration of Jennifer Howard, ¶ 2. ("Howard Dec.")

### A. The Note's Arbitration Clause Covers All Plaintiff's Claims.

As part of Plaintiff's employment package, Defendant extended her an Employee Forgivable Loan ("EFL") in the principal amount of $396,717.00. The EFL would be forgiven in annual installments over a six-year period. On March 13, 2006 Struther's executed the Note in exchange for the EFL. (Howard Dec., ¶ 3, Exh. 1). The Note provides, in part, that in the event Plaintiff's employment was terminated, either voluntarily or involuntarily by Plaintiff or UBSFS, for any reason whatsoever other than disability or death, the Note would become immediately due and payable in full, less any amounts forgiven, without presentment, demand, protest, notice of default or other notice. (Exh. 1 at p.2 – Arbtiration).

The Note provides that it is "governed by, and construed in accordance with the laws of the State of New York but without regard to the choice of law principles thereof." (Howard Dec., ¶3, Exh. 1).

The Note includes a broad arbitration clause which provides that the parties would submit all claims relating in any way to the Note or Plaintiff's employment to arbitration under the auspices of The NASD, Inc.[1]:

> "**Arbitration.** With the except of claims for injunctive relief under this Agreement, Employee and UBS Financial Services agree that any disputes between Employee and UBS Financial Services including **claims concerning compensation, benefits or other terms or conditions of employment and termination of employment, or any claims of discrimination, retaliation or harassment, or any other claims whether they arise by statute or otherwise ... or any other federal, state or local employment or discrimination laws, rules, regulations, including wage and hour laws**, will be

[1] In July 2007, FINRA was formed as the successor entity of two self-regulatory organizations, the NASD and the enforcement unit of the New York Stock Exchange. The arbitration is now under the auspices of FINRA.

> determined by arbitration as authorized and governed by the arbitration law of the state of New York. Any such arbitration will be conducted under the auspices and rules of The NASD, Inc. If for any reason, the NASD is unavailable or unable to hear the matter, then the appropriate forum in The New York Stock Exchange Inc., to the extent that forum is available. Subject to the parties' right to appeal or seek vacatur under applicable law, Employee and UBS Financial Services agree that the decision of the Arbitrator(s) will be final and binding on both or all parties."

(Howard Dec., ¶3, Exh. 1). (Emphasis added).

All claims relating to Struthers' employment are therefore covered by the arbitration clause in the Note.

### B. The Form U-4 Signed By Struthers Also Provides For Arbitration of Her Claims.

In addition to the Note, Struthers, consistent with industry practice and regulation, completed a Form U-4.[2] In it, Struthers agreed to arbitrate

> Any dispute, claim or controversy that may arise between me and my firm…that is required to be arbitrated under the rules, constitutions, or by laws of the SROs indicated in Section 4 (SRO REGISTRATION) as may be amended from time to time and that any arbitration award rendered against me may be entered as a judgment in any court of competent jurisdiction.

(Howard Dec., ¶4, Exh. 2).

In Section 4 of the Form U-4, Struthers acknowledged that she was registering with a number of SROs including the NASD. (Howard Dec., ¶4, Exh. 2).

FINRA rules provide for the arbitration of all employment claims between registered representatives and member firms except that employment discrimination claims shall be arbitrated only if the parties have agreed to arbitrate either before and after the dispute arose. (Request for Judicial Notice, Exh. 13, FINRA Rules, Rule 13201 ("FINRA Rules")). Here, Struthers expressly agreed to arbitrate all discrimination claims before the dispute arose by signing the Note.

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[2] A Form U-4 must be completed when a financial analyst initially seeks to register with the NASD or when a terminated FA reregisters upon obtaining employment with a new securities firm. *Cione v. Foresters Equity Services, Inc.*, 58 Cal.App.4th 625, 630, fn. 2 (1997)

Struthers also agreed to arbitrate her discrimination claims after the dispute arose by filing her Counter-Claim in arbitration wherein she sought relief for, in part, disability discrimination and sexual harassment. (Exh. 1 at p. 5 – Arbitration; Exh. 8 at ¶¶20-41). Under both the Note and the Form U-4, Struthers must arbitrate her claims.

**C. Arbitration Commences.**

On May 15, 2007, Plaintiff's employment with Defendant was terminated. (Howard Dec., ¶2). At the time Plaintiff's employment was terminated, the outstanding balance on the Note was $326,696.44.

On or about May 25, 2007, the UBSFS Asset Recovery Unit sent a letter to Plaintiff demanding repayment of any and all amounts due and owing under the Note. (Declaration of Stephen D. Bird, ("Bird Dec."), ¶3, Exh. 3). When Plaintiff did not repay the amounts due under the Note despite her clear obligation to do so, UBSFS filed a Statement of Claim with FINRA on October 4, 2007 for breach of contract based on Struther's failure to pay the amount outstanding under the Note. (Bird Dec, ¶4, Exh. 4). Plaintiff answered the Statement of Claim on January 30, 2008. (Bird Dec, ¶5, Exh. 5).

Plaintiff retained counsel who appeared in the arbitration as of March 3, 2008. (Bird Dec, ¶6, Exh. 6). Struthers filed the instant action in San Diego County Superior Court on March 6, 2008. (Bird Dec. ¶7, Exh. 7). Plaintiff, however, did not serve her original Complaint. (Bird Dec., ¶7). On March 31, 2008, Plaintiff filed a Counter-Claim in arbitration alleging eight causes of action, the six she alleged in her Superior Court action, and two more for partial rescission and unlawfully preventing employment by misrepresentation. (Bird Dec., ¶8, Exh. 8). On May 30, 2008, UBSFS filed and served its Answer in arbitration to Struther's Counter-Claim. (Bird Dec., ¶9, Exh. 10).

**D. Plaintiff Files Her First Amended Complaint.**

On July 1, 2008, Plaintiff filed and served the FAC in San Diego Superior

Court, alleging the same eight causes of action as she alleged in her Counter-Claim in arbitration. (Bird Dec., ¶11. Exh. 11). Plaintiff has refused to dismiss or stay her FAC pending the outcome of the arbitration. (Bird Dec., ¶12, Exh. 12).

Based on the plain terms of the arbitration clauses in the Note and the Form U-4, and the Court's power under both New York and California law to enforce the clauses, arbitration of this action should be compelled and Plaintiff's action dismissed or stayed.

## III. LEGAL ARGUMENT

### A. THE ARBITRATION AGREEMENTS ARE VALID AND ENFORCEABLE.

#### 1. Federal and State Law Favor Arbitration.

Federal courts have recognized a strong policy favoring arbitration such that "[a]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24-25, 103 S.Ct. 927 (1983).

Arbitration agreements are also enforceable under both New York and California state law.

Under New York law:

> A written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award. In determining any matter arising under this article, the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute.

NY CLS CPLR § 7501

Similarly, California law provides:

> A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid,

> enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract.

Code of Civil Procedure § 1281.

To the extent that state law is inconsistent with the FAA's broad policy of arbitration, it is preempted by the FAA. However, the agreements in this case meet both the New York and California standards.

### B. The Arbitration Clause In The Note Is Governed By New York Law.

The Note specifically states that all claims between the parties "will be determined by arbitration as authorized and governed by the arbitration law of the state of New York." (Howard Dec., ¶3, Exh. 1).

Under the choice-of-law test set forth in *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal. 4th 459, 466 (1992), California will apply the law of contractual choice if (1) the chosen state has a substantial relationship to the parties or their transaction or (2) there is any other reasonable basis for the parties' choice of law, unless the chosen state's law offends a "fundamental" California policy.

Here, the first consideration is met. In 2006, when the Note was entered into, New York was the Defendant's principal place of business. (Bird Dec., ¶2). Thus, there is a substantial relationship with New York and the choice of New York law in the Note is reasonable. *Brack v. Omni Loan Co., Ltd.*, 164 Cal. App. 4th 1312, 1324 (2008). An employer and employee may agree to select the law of another jurisdiction provided that the enforcement of the clause will not violate a fundamental policy of California. See *Olinick v. BMG Entertainment,* 138 Cal. App. 4th 1286, 1299 (2006).

New York arbitration law is not contrary to a fundamental policy of California. In New York, as in California, a contract is unconscionable only if it is both procedurally and substantively unconscionable. See *Gillman v. Chase Manhattan Bank, N.A.,* 537 N.Y.S.2d 787 (1988); *Armendariz v. Found. Health*

*Psychcare Servs., Inc.*, 24 Cal. 4th 83, 114 (2000). The relevant fundamental policies involving arbitration, arbitration agreements, and unconscionability, do not vary significantly between California and New York. First, both states recognize a strong public policy favoring arbitration. *Broughton v. Cigna Healthplans*, 21 Cal. 4th 1066, 1095 (1999); *Ranieri v. Bell Atlantic Mobile*, 759 N.Y.S.2d 448, 448 (2003).

Second, both California and New York courts recognize that arbitration agreements are "valid, irrevocable, and unenforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Discover Bank v. Super. Ct.*, 36 Cal. 4th 148, 163 (2005); *see Hayes v. County Bank*, 811 N.Y.S.2d 741, 743 (N.Y. App. Div. 2006). Both New York and California law also recognize that "a state court may refuse to enforce an arbitration agreement based on generally applicable contract defenses, such as fraud, duress, or unconscionability." *Discover Bank*, 36 Cal. 4th at 165; *Brower v. Gateway 2000, Inc.,* 676 N.Y.S.2d 569, 573 (N.Y. App. Div. 1998).

Third, California and New York law have similar approaches to unconscionability defenses. In each state, unconscionability requires a showing that the contract was both procedurally and substantively unconscionable when made. *Discover Bank*, 36 Cal. 4th at 160; *Brower*, 676 N.Y.S.2d at 573. Both states also recognize that "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required" for unenforceability. *Armendariz v. Foundation Health Psychcare Servs*., 24 Cal. 4th 83, 114, (2000); see *Brower*, 676 N.Y.S.2d at 574 ("the substantive element alone may be sufficient to render the terms of this provision at issue unenforceable.") Both focus on the same two factors for procedural unconscionability: oppression and surprise. *Laster v. T-Mobile USA, Inc.*, 407 F. Supp. 2d 1181, 1187 (S.D. Cal. 2005); *Brower,* 676 N.Y.S.2d at 572-73.

///

When an arbitration agreement contains a choice-of-law provision, that provision must be honored, and a court interpreting the agreement must follow the law of the jurisdiction selected by the parties. *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478-479 (1989).

Thus, because New York law does not conflict with California's fundamental policy regarding arbitration agreements, New York arbitration law applies here.

**C. There Are No Grounds for Finding the Arbitration Agreements Invalid or Unenforceable**

**1. Under New York Law, the Arbitration Agreements Are Enforceable.**

Under New York law, both procedural and substantive unconscionability are required to demonstrate that the arbitration clause is unconscionable. *Brower*, 676 N.Y.S.2d at 573. In other words, there must be "some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *Id.*

**2. Procedural Unconscionability**

Procedural unconscionability is present when the party seeking to enforce the contract has used high pressure tactics or deceptive language in the contract and where there is inequality of bargaining power between the parties. *Morris v. Snappy Car Rental*, 84 N.Y.2d 21, 30 (N.Y. 1994) Here, Struthers alleges that UBSFS agreed to advance her the cash EFL of $396, 717.00 and $132,239.00 in stock (approximately $529,000.00 total) to "induce" her to resign from Morgan Stanley to join UBSFS (FAC, ¶8(b)). Struthers has not alleged and cannot introduce any facts to establish an inequality of bargaining power. Struthers alleges she was making over $300,000 annually at Morgan Stanley and was the number one revenue producing FA at Morgan Stanley based on her years of experience. (FAC ¶7.) Struthers alleges that it was UBSFS that was attempting to induce her to leave Morgan Stanley and that it agreed to pay her a substantial sum of up front money and stock to induce her to join UBSFS. (FAC, ¶¶7,8).

Struthers did not have to accept an employment offer with UBSFS and she was not obligated to take the up front cash loan and stock. If she chose to forgo the cash and stock totaling approximately $529,000.00 she would not have been required to sign the Note - which had the arbitration clause and which secured the $396,717.00 EFL. The Note itself is only six pages, and the arbitration clause was typed in the same font size as the rest of the Note, with the clause title in bold to ensure that the reader was aware of this provision. (Howard Dec., ¶3, Exh. 1, page 5). The arbitration clause cannot be construed as "hidden or tucked away within a complex document of inordinate length." *Brower*, 676 N.Y.S.2d at 573. Plaintiff alleges that before she signed the Note she was a successful FA with $55 million in assets under management. (FAC, ¶7). The Note was a condition of her employment only if she accepted the large up front loan. The bargaining power was equal and Struthers new exactly what she was doing. Since there was no inequality of bargaining power and Struthers did not "lack any meaningful choice" in signing the Note, the arbitration clause is not procedurally unconscionable.

**3. Substantive Unconscionability**

Substantively, an unconscionable contract is one which is so grossly unreasonable or unconscionable in the light of the mores and business practices of the time and place as to be unenforceable. *Chaim Kaminetzky Presents Pesach With the Chevra 5765 LLC v. Starwood Hotels & Resorts Worldwide*, 2006 N.Y. Misc. LEXIS 3255 (2006). Where employees have agreed to promissory notes similar to the one at issue here, calling for arbitration under FINRA's predecessor, the NASD, New York courts have found them enforceable. *Briamonte v. Liberty Brokerage, Inc.*, 2000 U.S. Dist. LEXIS 4238 (S.D. NY 2000) (claims for sexual harassment, wrongful termination, and discrimination arbitrated under promissory note arbitration clause); *Maze v. Prudential Securities, Inc.*, 1993 U.S. Dist. LEXIS 17181 (S.D. NY 1993) (fraud, misrepresentation, breach of covenant of good faith and fair dealing claims arbitrated under promissory note arbitration agreement).

Here, the facts are even more compelling in favor of finding the arbitration clause substantively conscionable. Struthers cannot seriously argue that it is unconscionable for UBSFS to ask a sophisticated FA to agree to arbitrate her future claims against it in return for cash and stock worth approximately $529,000.00.

The Note's arbitration clause is therefore enforceable under New York law and UBSFS's motion should be granted.

### D. Under California Law, The Arbitration Agreements Are Enforceable.

Even if the Court were to find that California law governs the arbitration procedure (and it should not), the arbitration agreements are valid and enforceable under California law.

#### 1. The Arbitration Clause In the Note Is Not Procedurally Unconscionable.

Procedural unconscionability refers to "oppression" or "surprise" due to the unequal bargaining power that results in no real negotiation and an absence of meaningful choice. *24 Hour Fitness, Inc.,* 66 Cal.App.4th 1199, 1213 (1998); Code of Civil Procedure §1670.5. No evidence of procedural unconscionability exists in connection with the execution of the Note. First, Plaintiff cannot establish the "surprise" element of procedural unconscionability because she made a knowing agreement to arbitrate her claims. Second, Plaintiff cannot claim that she lacked bargaining power. Struthers received substantial consideration in exchange for executing the Note.[3] Even in cases without the exchange of the substantial consideration provided in this case, employers may require employees to sign arbitration agreements covering employment claims as a condition of their employment and enforce those agreements. *Lagatree v. Luce Forward Hamilton & Scripps* (1999) 74 Cal.App.4th 1105, 1122-1123. (". . . a predispute arbitration agreement is not invalid merely because it is imposed as a condition of employment").[4]

---

[3] See discussion *supra* at Section II, A.

Plaintiff expressly assented to arbitration by executing the Note, and she impliedly assented by continuing her employment without objecting to the terms of the Note. The manner and timing of Plaintiff's presentation of the Note to Plaintiff was not oppressive or surprising. Plaintiff was not required to accept the loan as a condition of her employment. Accordingly, the arbitration clause in the Note is not procedurally unconscionable.

**2. The Armendariz Factors And Substantial Unconscionability Analysis Do Not Apply To The Individually Negotiated Note.**

In *Armendariz, supra,* 24 Cal.4th 83, the California Supreme Court held that under certain circumstances employer mandatory arbitration agreements must satisfy specific requirements to be enforceable. These requirements, however, do not apply here.

The Court in *Armendariz* was careful to note with respect to FEHA claims that its "general endorsement of the *Cole*[5] requirement occurs in the particular context of **mandatory employment arbitration agreements**…" *Armendariz* at 103, fn.8 [emphasis added). In *Armendariz*, the employer's standard employment applications contained mandatory arbitration agreement clauses and the employees were later required to sign the employer's standard arbitration agreement as a condition of employment.

This is not a mandatory arbitration agreement case. In contrast to the plaintiffs in *Armendariz,* Struthers was not required to execute a standardized arbitration agreement as a condition of employment. Rather, as discussed above,

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[4] In approving of compulsory arbitration of employment disputes, the *Lagatree* Court cited to a myriad of state and federal court decisions enforcing arbitration clauses imposed as a condition of employment where the policies' terms were fair and equitable to the employee. *Id.* at 1122, 1123.

[5] In setting forth what are now known as the "*Armendariz* factors," the court adopted factors used by the D.C. District court in *Cole v. Burns Intern. Security Services*, 105 F.3d 1465 (D.C. Cir. 1997). *Armendariz* at 102.

Struthers entered into an individually-negotiated Note that was specific to her. Struthers had the opportunity to review the Note and negotiate its terms—and in fact negotiated substantial consideration to leave Morgan Stanley and join UBSFS. The specific requirements set forth by the court in *Armendariz* –and discussed below – therefore do not apply.

### 3. While the Form U-4 Is Procedurally Unconscionable, It is Still Enforceable Under Armendariz.

In *McManus v. CIBC World Markets Corp*, 109 Cal.App.4th 76 (2003), the court held that because the plaintiff was required to sign the Form U-4 as a condition of employment, the arbitration clause in the Form U-4 was procedurally unconscionable. *Id.* at 91. However, that finding did not make the arbitration clause unenforceable because the arbitration procedures – like the arbitration procedures in this case – satisfied the Armendariz standards.

### 4. Even If The Armendariz Requirements Apply To Both The Note And The Form U-4, The Requirements For Substantive Conscionability Are Met.

The Note and the Form U-4 comply with *Armendariz* requirements for substantive conscionability with respect to both FEHA and non-FEHA claims.

#### a. The *Armendariz* Factors For FEHA Claims Are Present.

In *Armendariz,* the court held that the following five factors must be met in a mandatory employment arbitration agreement which requires the arbitration of unwaivable rights, such as FEHA and wrongful termination in violation of public policy claims: (1) a neutral arbitrator, (2) adequate discovery, (3) a written award, (4) the availability of all of the types of relief that would otherwise be available in court, and (5) payment by the employer of any arbitration fees beyond what the employee would have to pay in court. *Armendariz at* 102-114. As set for the below, these factors are all present in this case. Thus, both the arbitration clause in the Note and in the Form U-4 are enforceable under California law and Struthers should be compelled to arbitrate her claims.

**b. The Agreements Provide For A Neutral Arbitrator.**

The Note and U-4 provide for the parties to arbitrate any dispute under the auspices and rules of FINRA's predecessor, the NASD.[6] Similar to the AAA rules for employment arbitrations, the FINRA rules require arbitrators for employment discrimination disputes to have specific experience in employment litigation and the panel chair may not have represented primarily the views of employers or of employees within the last five years. (FINRA Rules, Rule No. 13802). In *McManus, supra,* 109 Cal.App.4th at 97, the court found that the NASD arbitrator selection process did not render the Form U-4 substantially unconscionable.

**c. The Agreements Guarantee Adequate Discovery.**

The FINRA discovery provisions are sufficient for the vindication of Plaintiff's claims.[7] Under the applicable FINRA rules, necessary pre-hearing depositions consistent with the expedited nature of arbitration are available. (FINRA Rules, Rule No. 13510). The parties, similar to responses to interrogatories and requests for production, may exchange documents and information as well. (FINRA Rules, Rule No. 13506). In *McManus*, the court recognized that these discovery procedures provided for adequate discovery under *Arminderiz. McManus,* at 97-98. Accordingly, the FINRA rules of discovery guarantee the fairness of the discovery procedure of the arbitration of Plaintiff's claims.

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[6] FINRA has adopted the relevant NASD rules. The FINRA rulebook currently consists of both NASD Rules and certain NYSE Rules that FINRA has incorporated (Incorporated NYSE Rules). FINRA is in the process of consolidating the NASD and Incorporated NYSE rules into a single set of FINRA rules. http://www.finra.org/RulesRegulation/FINRARules/index.htm.

[7] The FINRA rules are similar to the American Arbitration Association's Employment Arbitration Rules and Mediation Procedures and have been expressly approved by federal and California courts as being fair and equitable. *See*, e.g., *Lagatree v. Luce Forward Hamilton & Scripps*, 74 Cal. App. 4th 1105, 1130, fn. 21 (2000).

**d. The Agreements Provide For A Written Arbitration Award.**

"[A]n arbitrator in a FEHA case must issue a written arbitration decision that will reveal, however briefly, the essential findings and conclusions on which the award is based." *Armendariz at* 107. Again, by incorporating the FINRA rules, the Note and U-4 provide for an adequate written award. The FINRA rules provide that "[t]he arbitrator(s) shall issue an award setting forth a summary of the issues, including the type(s) of dispute(s), the damages or other relief requested and awarded, a statement of any other issues resolved, and a statement regarding the disposition of any statutory claim(s). (FINRA Rules, Rule No. 13802(e)); *McManus*, *supra*, at 100 (FINRA requires that all arbitration awards be in writing. The Form U-4 was not substantively unconscionable).

**e. The Agreements Do Not Limit Remedies.**

The Note and U-4 set no limits on the amount of recovery or type of remedy that Plaintiff may seek and obtain through arbitration. Under the FINRA rules, the arbitrator(s) are empowered to award any relief that would be available in court. (FINRA Rules, Rule No. 13802(e)). The FINRA rules also state that the arbitrator "shall have the authority to provide for reasonable attorneys' fee reimbursement, in whole or in part, as part of the remedy in accordance with applicable law." (FINRA Rules, Rule No. 13802(f).)

**f. The Agreements Comply With Arbitration Cost Requirements.**

In the case of mandatory arbitration of FEHA claims, the arbitration agreement "cannot generally require the employee to bear any type of expense that the employee would not be required to bear if he or she were free to bring the action in court." *Armendariz at* 110-111. The FINRA rules, which are incorporated in the arbitration agreement, limit the filing fee to $200 and require the firm to pay the remainder of all arbitration fees for a employment discrimination claim.[8] (FINRA Rules, Rule No. 13802(d)). This requirement has therefore been met.

**5. The Court May Sever Any Provisions It Finds Unconscionable and/or Imply Terms Into The Agreement.**

As demonstrated above, the crucial elements of an enforceable arbitration agreement, as required by California law under *Armendariz*, are present in the arbitration agreements signed by Plaintiff. However, in the event that any collateral provision is found to be unconscionable, it may be severed. California Civil Code § 1599; *Armendariz*, 24 Cal.4th at 124.

Additionally, if the express provisions in the arbitration agreements are found not sufficiently compliant with the *Armendariz* requirements, the Court can imply the terms into the agreements, as the *Armendariz* Court did:

> [N]othing in the present arbitration agreement precludes such written findings and to the extent it applies to FEHA claims the agreement must be interpreted to provide such findings.

*Armendariz*, 24 Cal.4th at 107.

In short, in the event this Court finds that any provision of the arbitration agreements do not comport with the standards of current California law (and it should not), UBSFS requests that the provision be severed and/or that the missing requirement be implied, as that would be the just result and the one which will give the greatest effect to the intent of the parties.

**E. All of Plaintiff's Claims Are Subject to the Arbitration Clause of the Note.**

The broad language of the parties' arbitration clause provides for arbitration of "[a]ny disputes between [Struthers] and [UBSFS] including claims concerning compensation, benefits or other terms and conditions of employment and termination of employment, or any claims for discrimination…arising under…any…federal, state or local employment or discrimination laws, rules or regulations….” (Howard Dec., ¶3, Exh. 1).

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[8] Plaintiff paid the FINRA $200.00 filing fee when she filed her counter-claim in arbitration. (Bird Decl., ¶8, Exh. 9).

Under both New York and California law, a broadly worded arbitration clause such as the one in the parties' Note applies to any dispute that has its roots in the employment relationship. *Wolitarsky v. Blue Cross of California,* 53 Cal. App. 4th 338, 347-348 (1997); *see also Vianna v. Doctors' Management Co.*, 27 Cal. App. 4th 1186, 1189-1190 (1994) (agreement providing for arbitration in event of "any dispute of any kind whatsoever regarding the meaning, interpretation or enforcement of the provisions" of employment contract encompassed claims for termination in violation of public policy, breach of implied covenant of good faith and fair dealing, negligent infliction of emotional distress, and defamation); *Buckhorn v. St. Jude Heritage Medical Group,* 121 Cal. App. 4th 1401, 1406 (2004) (agreement providing for arbitration "[i]n the event that a dispute arises between the parties concerning the enforcement or the interpretation of any provisions of this Agreement, such dispute shall be submitted to arbitration for resolution" allowed arbitration of tort claims as well as contractual claims.) Here, Struthers' FAC contains eight causes of action, all of which relate to the Agreement and to her employment with UBSFS.

In her first and second causes of action for intentional misrepresentation and negligent misrepresentation, respectively, Struthers alleges that UBSFS made false promises to induce her to resign from her former job to work for UBSFS and sign the Note. (FAC, ¶6-22).

In her third cause of action for violation of the FEHA, Struthers alleges that UBSFS subjected her to sexual harassment and discrimination based on her alleged disability. (FAC, ¶23-44). In her fourth cause of action, Struthers alleges that UBSFS publicly disclosed her medical and personnel information. (FAC, ¶45-57). In her fifth cause of action, Struthers alleges that UBSFS directed "outrageous conduct" toward her during her employment. (FAC, ¶58-63). Struthers' sixth and seventh causes of action for breach of the implied covenant of good faith and fair dealing and partial rescission, respectively, relate directly to the Note. (FAC, ¶64-36(sic)). In her eighth cause of action for unlawfully preventing employment by misrepresentation, Struthers alleges that due to the actions of UBSFS, including the public disclosure that her employment was terminated, she has been prevented from obtaining other employment. (FAC, ¶73-76(sic)). All of these allegations relate to Struthers' employment and to the Note and must, therefore, be submitted to arbitration.

**F. Plaintiff's Belated Attempt At Rescission Fails.**

More than two years after she signed the Note, reaped its benefits by accepting $396,717.00, and only when she was reminded that the Note requires her to arbitrate her claims, is Plaintiff attempting to partially rescind the Note. There is no legal basis on which to partially rescind.

Plaintiff signed the Note on March 17, 2006. By accepting the money, remaining on the job, Plaintiff signified her acceptance of the agreement. See *Circuit City Stores, Inc. v. Najd,* 294 F.3d 1104, 1106 (9th Cir. 2002).

Plaintiff cannot avoid the arbitration clause by claiming that she failed to read it or did not know what she was signing. *Rosenthal v. Great Western Financial. Securities Corp.,* 14 Cal. 4th 394, 423 (1996). The court in *Rosenthal* found, "ordinarily one who signs an instrument which on its face is a contract is deemed to assent to all its terms. A party cannot avoid the terms of a contract on the ground that he or she failed to read it before signing." It follows that one party's unreasonable reliance on the other's misrepresentations resulting in a failure to read a written agreement before signing it, is an insufficient basis, under the doctrine of fraud in the execution, for permitting that party to avoid an arbitration agreement. *Id.* See also, *King v. Prudential-Bache Securities, Inc.,* 226 Cal.App. 3d 749, 751-752 (1990) (arbitration agreement not obtained by fraud when employer told plaintiff to sign a host of forms; and "because of the rush it was not possible for [plaintiff] to thoroughly examine the contents of the documents.")

Plaintiff's delayed recession attempt also fails because a party who would rescind a contract, must act promptly and restore, or offer to restore, to the other party what he received under it. *Williams v. Macchio*, 69 Misc. 2d 94, 98 (N.Y. Sup. Ct. 1972); *Estrada v. Alvarez,* 38 Cal.2d 386, 390 (1952). Plaintiff has not acted promptly, nor has she offered to restore the substantial consideration she received under the Note.

Plaintiff's untimely and improper rescission argument should therefore be summarily rejected. The arbitration clause in the Note is enforceable and this matter should be ordered to arbitration.

In any event, Plaintiff does not allege recession of the Form U-4 agreement to arbitrate, which is the SEC approved document that all registered representative must sign as a condition of employment to register with the SROs and which, of course, cannot be rescinded. *McManus, supra,* 109 Cal.App.4th at 84.

**G. Plaintiff's Claim for Fraud in the Inducement Must Be Arbitrated**

Under both New York and California law, unless a party can establish that there was a "grand scheme" to defraud which permeated the entire agreement, including the arbitration provision, a broadly worded arbitration provision will be deemed separate from the substantive contractual provisions and the agreement to arbitrate may be valid despite the underlying allegation of fraud. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395 402 (1967); *GAF Corp. v Werner*, 66 NY2d 97, 102 (1985).

In *Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440, 446 (2006), the United States Supreme Court reaffirmed a nearly 40-year-old rule and held that a challenge to the validity of a contract containing an arbitration clause must be decided first by the arbitrator, not a court. In so holding, the Court relied upon *Prima Paint,* which held that a federal court faced with a claim of fraud in the inducement of a contract containing an arbitration clause could not adjudicate the claim unless the claim went to the making of the agreement to arbitrate itself and not to the making of the contract generally. The *Buckeye* Court also went one step further, holding that the *Prima Paint* rule also applies in state court and contains no exception for contracts deemed void under state law.

Here, Plaintiff's bare conclusionary assertions are insufficient to demonstrate that 'the alleged fraud was part of a grand scheme that permeated the entire contract including the arbitration provision" *Cologne Reins. Co. of Am. v Southern Underwriters*, 630 N.Y.S.2d 548, 681 (1995). Accordingly, *Buckeye* makes clear that Plaintiff must first pursue her claims in arbitration. Indeed, Plaintiff is claiming that she should not be required to honor the arbitration clause contained in her Form U-4 and Note because those agreements are somehow wholly void on account of her allegedly being "fraudulently induced" into her employment with UBSFS. This type of claim fits squarely within the holding of Buckeye.

Thus, the question of whether there was fraud in the inducement of the contract must be submitted to the arbitrator. *Id.* at 681; *St. Agnes Medical Center v. PacifiCare of California*, 31 Cal. 4th 1187, 1198-1199 (2003).

As discussed above[9], Plaintiff's claim for fraud in the inducement does not apply to the Form U-4 agreement to arbitrate. She cannot claim that she was induced into signing the Form U-4 by UBSFS.

### H. **This Action And All Proceedings Should Be Stayed Pending Outcome Of The Arbitration.**

If the Court orders arbitration, as it must in this case, it should dismiss the action in its entirety. *Sparling v. Hoffman Constr. Co.*, 864 F2d 635, 638 (9th Cir. 1988): see also *Martin Marietta Aluminum, Inc. v. Gen. Elec. Co.,* 586 F2d 143 (9th Cir. 1978); *Cf. Underwriters Reinsurance Co. v. Ace Am. Ins. Co.*, 2003 U.S.

[9] See discussion, *supra* at Section II, B.

Dist. LEXIS 24814 (D. Cal., 2003) (dismissing plaintiff's action where all claims were arbitrable).

Alternatively the Court must stay this action. Federal, New York and California law provide that the action should be stayed until a final decision has been rendered in the arbitration proceedings. 9 U.S.C. §3; NY CPLR 3211(a)(5) and 7503(a); California Code of Civil Procedure § 1281.4. Defendant also seeks fees and costs expended in bringing this Motion.

## IV. CONCLUSION

Plaintiff Gail Struthers must be compelled to arbitrate her claims, as she agreed to do in the Note and the Form U-4 and which claims are already subject to a pending FINRA arbitration. Accordingly, UBSFS requests that the Court enter such an order, stay or dismiss this action until the arbitration is completed.

DATED: September 8, 2008

EPSTEIN BECKER & GREEN, P.C.

By: ______________________
James A. Goodman
Kathryn T. McGuigan

Attorneys for Defendant
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(improperly pled as "UBS Financial Services, Inc.")

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(improperly pled as "UBS Financial Services, Inc.")

**UNITED STATES DISTRICT COURT**

**SOUTHERN DISTRICT OF CALIFORNIA**

| | |
|---|---|
| GAIL STRUTHERS, an individual,<br>Plaintiff,<br>v.<br>UBS FINANCIAL SERVICES, INC., a corporation; and DOES 1 through 10, inclusive,<br>Defendants. | CASE NO. 08cv1381 H (JMA)<br>Judge Marilyn L. Huff<br>**DECLARATION OF JENNIFER HOWARD IN SUPPORT OF DEFENDANT UBS FINANCIAL SERVICES INC.'S NOTICE OF MOTION AND MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS**<br>**DATE: October 6, 2008**<br>**TIME: 10:30 a.m.**<br>**CRTR: 13** |

# DECLARATION OF JENNIFER HOWARD

I, Jennifer Howard declare as follows:

1. I am employed by Defendant UBS Financial Services, Inc. ("Defendant) as a Client Relationship Manager in the Human Resources Department. Except as may be expressly noted below, I have personal knowledge of the facts set forth in this declaration and, if called as a witness, could and would testify competently to such facts under oath.

2. I have reviewed the personnel records of Plaintiff Gail Struthers ("Plaintiff") which Defendant maintains. These records are maintained in the ordinary course of business, the records are prepared close in time to the event that is memorialized and accurately memorialize the event. According to the records in Plaintiff's file, Defendant hired her on February 16, 2006 as a Financial Advisor and registered securities representative. Her employment was terminated on May 15, 2007.

3. As part of Plaintiff's employment package, Plaintiff was extended a loan in the principal amount of $396,717.00. In exchange for the loan, Plaintiff executed and delivered to Defendant a written promissory note dated March 7, 2006 and signed by Plaintiff on March 13, 2006. A true and correct copy of the promissory note signed by Plaintiff is attached hereto as
Exhibit 1.

4. As a registered representative, Plaintiff executed a Uniform Application for Securities Industry Registration or Transfer ("Form U-4"). A true and correct copy of the U-4 signed by Plaintiff On February 16, 2006 is attached hereto as Exhibit 2.

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I declare under penalty of perjury under the laws of the State of California and of the United States that the foregoing is true correct.

Executed this 5 of September, 2008 in Weehawken, New Jersey

JENNIFER HOWARD

*Gail Struthers v. UBS Financial Services, Inc.*
United States District Court - CASE NO. 08cv1381 H (JMA)

Judge Marilyn L. Huff

Courtroom 13

**DEFENDANT UBS FINANCIAL SERVICES INC.'S NOTICE OF MOTION AND MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATIONS OF JENNIFER NIES AND STEPHEN D. BIRD IN SUPPORT OF THEREOF**

# EXHIBIT "1"

**Promissory Note 99102**

$396,717.00

03/07/2006

FOR VALUE RECEIVED, Gail Struthers, (the "Employee") hereby promises to pay UBS Financial Services Inc., a Delaware corporation ("UBS Financial Services"), at its offices at 1285 Avenue of the Americas, New York, New York 10019, U.S.A., or assigns, the principal sum of $396,717.00 (the "Principal Amount") in one lump-sum payment on 03/07/2012, subject to required prepayment in whole or in part to the extent hereinafter provided.

**Interest Rate.** Except as hereinafter specifically provided, no interest shall be due or payable on the Principal Amount or any balance thereof.

**Interest Upon Default in Payment.** If the Employee defaults in the timely payment of any portion of the Principal Amount or any interest thereon or any other amount which is due and payable to UBS Financial Services pursuant to the terms of this Note, whether by required prepayment on any payday, at stated maturity, by acceleration or otherwise, after notice and a thirty-day cure period, the Employee shall pay interest thereon, to the extent permitted by law, from the date such payment was due until paid at an interest rate equal to the rate of interest announced from time to time by Citibank, N.A. in New York, New York, as its base rate or "prime rate" of interest on loans to responsible and substantial commercial borrowers plus two percent (2%) compounded monthly.

**Forgiveness of Principal Amount.** Notwithstanding any of the forgoing provisions of this Note, UBS Financial Services shall forgive in equal installment(s) the Principal Amount on 03/07/2007, 03/07/2008, 03/07/2009, 03/07/2010, 03/07/2011, 03/07/2012, if on such date all of the following conditions are met:

(i) the Employee has, at all times since the date of this Note remained in the full-time employ of UBS Financial Services or one or more other corporations more than 50 percent of the voting stock of which is owned, directly or indirectly, by UBS AG ("UBS"), and

(ii) this Note has not been declared by UBS Financial Services to be immediately due and payable pursuant to its option to accelerate or accelerated automatically by its terms.

If Employee's employment with UBS Financial Services or UBS shall terminate, whether voluntarily or involuntarily, other than by reason of Disability (as hereinafter defined) or death, no part of the unpaid Principal Amount shall be forgiven.

REV: 05/16/05

Initial ______

**Acceleration.** This Note shall immediately become due and payable without presentment, demand, protest, notice of default or other notice of any kind, which the Employee hereby expressly waives, in the event that the Employee's employment with UBS Financial Services or UBS is terminated, either voluntarily or involuntarily by the Employee, UBS Financial Services, or UBS for any reason whatsoever other than disability or death.

In addition, UBS Financial Services, at its option, may declare this Note immediately due and payable without presentment, demand, protest, notice of default or other notice of any kind, which the Employee hereby expressly waives, if one or more of the following events shall occur:

(i) the Employee has not obtained and maintained in full force and effect all licenses and registrations from the National Association of Securities Dealers, Inc., securities exchanges, state securities commissions and other regulatory bodies as UBS Financial Services or UBS shall determine is necessary or appropriate in order for the Employee to conduct securities or commodities transactions or otherwise perform the functions for which he/she is employed; or

(ii) at any time, in the sole opinion of UBS Financial Services, the financial responsibility of the Employee has become impaired, such impairment to include, without limiting the generality of the foregoing, the filing of a voluntary or involuntary petition by or against the Employee under any provision of any Federal or state bankruptcy, insolvency, reorganization or similar laws; the appointment of a receiver to manage the Employee's property; an assignment for the benefits of creditors; the entry of judgement or lien or issuance of a warrant or an order of attachment or garnishment against the Employee or his/her property; or the commencement of any proceeding or procedure for enforcement of a money judgement against the Employee; or

(iii) the Employee defaults in the timely payment of any amount due and payable to UBS Financial Services pursuant to the terms of this Note, whether by required prepayment on any payday, at stated maturity, by acceleration or otherwise.

**Solicitation of Clients While Debt Outstanding.** Until such time as this Promissory Note #99102 has been forgiven by UBS Financial Services in full pursuant to the terms herein, or repaid by Employee to UBS Financial Services in full, or for a period of one year from Employee's termination date, whichever of these periods shall be less, Employee agrees, in the event Employee is terminated for any reason whatsoever, whether voluntarily or involuntarily, to not solicit, directly or indirectly, any of the clients who maintain accounts at UBS Financial Services ("Clients of UBS Financial Services") whom Employee serviced during his/her employment at UBS Financial Services or other Clients of UBS Financial Services Inc. whose names became known to Employee while in the employ of UBS Financial Services.

REV: 05/16/05

Initial [signature]

"Solicit" as set forth in this paragraph means that the Employee will not initiate, whether directly or indirectly, any contact or communication of any kind whatsoever, for the purpose of inviting, encouraging or requesting a client or that may have the effect of inviting, encouraging or requesting a client:

(a) to transfer his/her UBS Financial Services account(s) to the Employee or his/her new employer; or
(b) to open a new account with Employee or his/her new employer; or
(c) to otherwise discontinue its existing business relationship with UBS Financial Services.

**Confidentiality of Client Information.** Employee further expressly agrees that in the event Employee's employment is terminated for any reason whatsoever, whether voluntarily or involuntarily, and whether or not this Note #99102 has been forgiven by UBS Financial Services in full pursuant to the terms herein, or repaid by Employee to UBS Financial Services in full, Employee may not take any records or information referring or relating to Clients of UBS Financial Services, whether originals or copies, in hard copy or computerized form, except that at such time as this Promissory Note #99102 has been forgiven by UBS Financial Services in full pursuant to the terms herein, or repaid by Employee to UBS Financial Services in full, Employee will be permitted to take a list containing only the names of clients who Employee introduced to UBS Financial Services, the addresses and telephone numbers for those clients and the title (but not account numbers) of their UBS Financial Services' accounts.

**Other Agreements.** In the event that Employee enters into other agreements with UBS Financial Services that contain non-solicitation and/or confidentiality obligations, including, but not limited to, Corporate Employee Account Servicing Agreements, Receiving and/or Retiring Financial Advisor Agreements, Financial Advisor Team Agreements, and/or Account Assignment Agreements, the non-solicitation and/or confidentiality provisions of any such agreement shall govern the Employee's conduct with respect to the solicitation of clients and use of client information covered by those Agreements.

**Remedies.** In the event that any of the provisions contained in the **Solicitation of Clients While Debt Outstanding** and/or **Confidentiality of Client Information** Paragraphs of this Note are breached by Employee, Employee understands that Employee will be liable to UBS Financial Services for any damage and/or injury, including but not limited to reasonable attorney's fees, incurred to enforce the provisions of this Note. Employee also specifically agrees that, in the event of breach of the **Solicitation of Clients While Debt Outstanding** and/or **Confidentiality of Client Information** Paragraphs of this Note, damages alone will be an inadequate remedy and UBS Financial Services will in addition to damages for past breach be entitled to injunctive or other equitable relief against Employee to enforce the provisions of these Paragraphs.

REV: 05/16/05

Initial ______

EMPLOYEE FURTHER EXPRESSLY CONSENTS TO THE ISSUANCE OF A TEMPORARY RESTRAINING ORDER OR A PRELIMINARY INJUNCTION BY ANY COURT OR ARBITRATION PANEL WITH JURISDICTION OVER EMPLOYEE TO PROHIBIT THE BREACH OF ANY PROVISION OF THIS PROMISSORY NOTE, OR TO MAINTAIN THE STATUS QUO PENDING THE OUTCOME OF ANY ARBITRATION PROCEEDING WHICH MAY BE INITIATED; AND, FURTHER, THAT THE ISSUE OF TEMPORARY AND PRELIMINARY INJUNCTIVE RELIEF MAY BE DECIDED BY A COURT AND NOT BY AN ARBITRATION PANEL SHOULD UBS FINANCIAL SERVICES IN ITS DISCRETION ELECT TO SEEK SUCH RELIEF.

**Death and Disability.** If the Employee shall die or incur a Disability (which shall mean a total and permanent disability as such term is used in the UBS Financial Services Inc. Pension Plan) while a full-time employee of UBS Financial Services or UBS, then UBS Financial Services shall forgive the Principal Amount (but not any unpaid withholding and employment taxes) on the date of the Employee's death or the date the Employee incurred such Disability.

**Payments and Withholding Taxes.** To provide for the payment of the Federal, State and local income and employment taxes required to be withheld from the Employee at the time any installment of the Principal Amount may be forgiven ("Withholding Taxes"), Employee agrees to pay to UBS Financial Services or UBS (and Employee authorizes UBS Financial Services or UBS to deduct and withhold from the compensation otherwise due to Employee) on each payday a proportionate part of the Withholding Taxes due upon the forgiveness of the next installment of the Principal Amount. UBS Financial Services or UBS shall notify the Employee of the estimated amount of Withholding Taxes and the amount of each payment to be deducted on each payday. If on the date any installment of Principal Amount is to be forgiven the amount theretofore paid by (or deducted from) Employee to UBS Financial Services or UBS is less than the amount of Withholding Taxes due with respect to the amount forgiven, Employee shall promptly pay any deficiency to UBS Financial Services or UBS, and if the amount paid is in excess of the amount of Withholding due, UBS Financial Services or UBS shall promptly pay such excess to Employee.

Before a particular installment of the Principal Amount has been forgiven, all amounts the Employee paid to UBS Financial Services as Withholding Taxes shall be applied as payments on account of the Principal Amount. The payment to UBS Financial Services by Employee of any Withholding Taxes on account shall not obligate UBS Financial Services to forgive all or any part of the Principal Amount on any installment date unless and until all of the conditions to the forgiveness of any Principal Amount are satisfied in full.

**Default and Collection and Waivers.** The Employee agrees to pay any and all costs and expenses, including without limitation, reasonable attorney's fees and disbursements, incurred by UBS Financial Services in connection with the enforcement of any and all provisions of this Note and in regard to any defenses to the Note or counterclaims brought in the action to enforce the Note.

The Employee hereby waives (i) all benefits of any law exempting his/her property, or any part of it, from attachment, garnishment, or execution, and (ii) trial by jury and the right to interpose any defense, set-off or counterclaim of any nature or description in any action arising out of or relating to this Note in which UBS Financial Services is an adverse party.

REV: 05/16/05

Initials

**Arbitration.** With the exception of claims for injunctive relief under this Agreement, Employee and UBS Financial Services agree that any disputes between Employee and UBS Financial Services including claims concerning compensation, benefits or other terms or conditions of employment and termination of employment, or any claims for discrimination, retaliation or harassment, or any other claims whether they arise by statute or otherwise, including but not limited to, claims arising under Title VII of the Civil Rights Act of 1964, as amended, The Age Discrimination in Employment Act of 1967, The Worker Adjustment and Retraining Notification Act, The Employee Retirement Income Security Act, The Americans With Disabilities Act, The Equal Pay Act of 1963, The Americans With Disabilities Act of 1990, The Family and Medical Leave Act of 1993, The Sarbanes-Oxley Act, or any other federal, state or local employment or discrimination laws, rules or regulations, including wage and hour laws, will be determined by arbitration as authorized and governed by the arbitration law of the state of New York. Any such arbitration will be conducted under the auspices and rules of The NASD, Inc. If for any reason, the NASD is unavailable or unable to hear the matter, then the appropriate forum is The New York Stock Exchange Inc., to the extent that forum is available. Subject to the parties' right to appeal or seek vacatur under applicable law, Employee and UBS Financial Services agree that the decision of the Arbitrator(s) will be final and binding on both or all parties.

All claims based upon allegations of unlawful discrimination, retaliation, or harassment which include all bases of discrimination under federal law and under the laws of the state or localities in which you work, including, for example, age, race, disability, national origin, religion, and sex (some of the statutes that provide for such claims are Title VII of the Civil Rights Act of 1964, as amended, the Age Discrimination in Employment Act of 1967, The Americans With Disabilities Act, the Equal Pay Act of 1963, and the Family & Medical Leave Act) are eligible for the Employee's voluntary submission to UBS Financial Services Inc.'s Forum for Alternate Issue Resolution (UBS Financial Services Inc. F.A.I.R.) for resolution, prior to the filing of NASD proceedings.

**Not an Employment Contract.** The Employee expressly acknowledges that this Note is not an employment contract or an agreement to employ him/her for a specified period of time or a promise of continued employment with UBS Financial Services or a promise of employment with UBS for any period whatsoever.

**Extensions and Waivers.** UBS Financial Services may grant extensions and/or renewals hereof at its discretion, without notice and without releasing the liability of any party hereto. However, no failure to exercise any right, no partial exercise and no delay in exercising any such right (including without limitation acceptance by UBS Financial Services of any late payment or other default), or any other course of dealing between the Employee and UBS Financial Services, shall constitute a waiver by UBS Financial Services of its right to exercise any of its options or any of its rights hereunder at any time.

**Assignment.** This Note may be assigned by UBS Financial Services and the benefits and obligations thereof shall inure to UBS Financial Services' successors and assigns.

**Terms and Modifications.** This Note contains all the terms of the agreement between the parties hereto relating to the subject matter hereof and may not be modified except by a writing signed by the party to be bound thereby.

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Initial

**Invalid Provisions.** If any provision of this Note is held to be illegal, invalid or unenforceable under present or future laws effective during the term hereof, such provision shall be fully severable and this Note shall be construed and enforced as if such illegal, invalid or unenforceable provision had never comprised a part hereof and the remaining provisions hereof shall remain in full force and effect and shall not be affected by the illegal, invalid or unenforceable provision by its severance herefrom. Any provision of this Note that is inapplicable to an employee as a result of the fact that said employee's position with UBS Financial Services or UBS is in a non-production capacity shall not affect the balance of the Note.

**Governing Law.** This Note shall be governed by, and construed in accordance with, the laws of the State of New York but without regard to the choice of law principles thereof.

**Headings.** The headings contained in this Note are inserted for convenience only and shall not affect the meaning or interpretation of this Note

IN WITNESS WHEREOF, the undersigned has signed this Note as of the date and year first above written.

Date: 3-13-06

Employee (Signature)

3546 Mt. Everest Blvd
Address

San Diego, CA 92111
City, State, Zip Code

San Diego
Country

**FOR INTERNAL USE**

UBS Financial Services Inc. Branch/Home Manager Signature

REV: 05/16/05

Initial

*Gail Struthers v. UBS Financial Services, Inc.*
United States District Court - CASE NO. 08cv1381 H (JMA)

Judge Marilyn L. Huff

Courtroom 13

**DEFENDANT UBS FINANCIAL SERVICES INC.'S NOTICE OF MOTION AND MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATIONS OF JENNIFER NIES AND STEPHEN D. BIRD IN SUPPORT OF THEREOF**

# EXHIBIT "2"

# FORM U4
# UNIFORM APPLICATION FOR SECURITIES INDUSTRY REGISTRATION OR TRANSFER

**U4 - RELICENSE**
**02/15/2006**

Rev. Form U4 (10/2005)

## 1. GENERAL INFORMATION

| | | | |
|---|---|---|---|
| **First Name:** GAIL | **Middle Name:** ANN | **Last Name:** STRUTHERS | **Suffix:** |
| ***Firm* CRD #:** 8174 | ***Firm* Name:** UBS FINANCIAL SERVICES INC. | **Employment Date** (MM/DD/YYYY): 02/16/2006 | |
| **Firm Billing Code:** EW0 | ***Individual CRD #*:** 3004011 | **Individual SSN:** 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 | |

**Do you have an independent contractor relationship with the above named firm?:**

○ **Yes** ◉ **No**

**Office of Employment Address**

| CRD Branch # | NYSE Branch Code # | Firm Billing Code | Address | Private Residence | Type of Office | Start Date | End Date |
|---|---|---|---|---|---|---|---|
| 88783 | EW0 | EW0 | 5050 AVENIDA ENCINAS<br><br>CARLSBAD , CA 92008 | N | Located At | 02/16/2006 | |

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## 2. FINGERPRINT INFORMATION

Electronic Filing Representation

◉ By selecting this option, I represent that I am submitting, have submitted, or promptly will submit to the appropriate *SRO* a fingerprint card as required under applicable *SRO* rules; or

Fingerprint card barcode

○ By selecting this option, I represent that I have been employed continuously by the *filing firm* since the last submission of a fingerprint card to CRD and am not required to resubmit a fingerprint card at this time; or,

○ By selecting this option, I represent that I have been employed continuously by the *filing firm* and my fingerprints have been processed by an *SRO* other than NASD. I am submitting, have submitted, or promptly will submit the processed results for posting to CRD.

Exceptions to the Fingerprint Requirement

○ By selecting one or more of the following two options, I affirm that I am exempt from the federal fingerprint requirement because I/*filing firm* currently satisfy(ies) the requirements of at least one of the permissive exemptions indicated below pursuant to Rule 17f-2 under the Securities Exchange Act of 1934, including any notice or application requirements specified therein:

☐ Rule 17f-2(a)(1)(i)

Rule 17f-2(a)(1)(iii)

Investment Adviser Representative Only Applicants

- I affirm that I am applying only as an investment adviser representative and that I am not also applying or have not also applied with this *firm* to become a broker-dealer representative. If this radio button/box is selected, continue below.
  - I am applying for registration only in *jurisdictions* that do not have fingerprint card filing requirements, or
  - I am applying for registration in *jurisdictions* that have fingerprint card filing requirements and I am submitting, have submitted, or promptly will submit the appropriate fingerprint card directly to the *jurisdictions* for processing pursuant to applicable *jurisdiction* rules.

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## 3. REGISTRATIONS WITH UNAFFILIATED FIRMS

Some *jurisdictions* prohibit "dual registration," which occurs when an individual chooses to maintain a concurrent registration as a representative/agent with two or more *firms* (either BD or IA *firms*) that are not affiliated. *Jurisdictions* that prohibit dual registration would not, for example, permit a broker-dealer agent working with brokerage *firm* A to maintain a registration with brokerage *firm* B if *firms* A and B are not owned or controlled by a common parent. Before seeking a dual registration status, you should consult the applicable rules or statutes of the *jurisdictions* with which you seek registration for prohibitions on dual registrations or any liability provisions.

Please indicate whether the individual will maintain a "dual registration" status by answering the questions in this section. (Note: An individual should answer 'yes' only if the individual is currently registered and is seeking registration with a *firm* (either BD or IA) that is not affiliated with the individual's current employing *firm*. If this is an initial application, an individual must answer 'no' to these questions; a "dual registration" may be initiated only after an initial registration has been established).

| Answer "yes" or "no" to the following questions: | Yes | No |
|---|---|---|
| **A.** Will *applicant* maintain registration with a broker-dealer that is not *affiliated* with the *filing firm*? If you answer "yes," list the *firm*(s) in Section 12 (Employment History). | ○ | ● |
| **B.** Will *applicant* maintain registration with an investment adviser that is not *affiliated* with the *filing firm*? If you answer "yes," list the *firm*(s) in Section 12 (Employment History). | ○ | ● |

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## 4. SRO REGISTRATIONS

**Check appropriate *SRO* Registration requests.**
**Qualifying examinations will be automatically scheduled if needed. If you are only scheduling or re-scheduling an exam, skip this section and complete Section 7 (EXAMINATION REQUESTS).**

| REGISTRATION CATEGORY | NASD | NYSE | AMEX | BSE | NSX | PCX | CBOE | CHX | PHLX | ISE |
|---|---|---|---|---|---|---|---|---|---|---|
| OP - Registered Options Principal (S4) | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |
| IR - Investment Company and Variable Contracts Products Rep. (S6) | ☐ | ☐ | ☐ | | ☐ | | | | | |
| GS - Full Registration/General Securities Representative (S7) | ☑ | ☑ | ☑ | ☐ | ☐ | ☑ | ☑ | ☐ | ☑ | ☐ |
| TR - Securities Trader (S7) | | ☐ | ☐ | | ☐ | | | | | |
| TS - Trading Supervisor (S7) | | ☐ | ☐ | | ☐ | | | | | |
| SU - General Securities Sales Supervisor (S9 and S10) | ☐ | | | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | |
| BM - Branch Office Manager (S9 and S10) | | ☐ | ☐ | | | | | | | |
| SM - Securities Manager (S12) | | ☐ | | | | | | | | |
| AR - Assistant Representative/Order Processing (S11) | ☐ | | | | ☐ | | | ☐ | | |
| **REGISTRATION CATEGORY** | **NASD** | **NYSE** | **AMEX** | **BSE** | **NSX** | **PCX** | **CBOE** | **CHX** | **PHLX** | **ISE** |
| IE - United Kingdom - Limited General Securities Registered Representative (S17) | ☐ | ☐ | ☐ | | | ☐ | ☐ | | ☐ | |
| DR - Direct Participation Program Representative (S22) | ☐ | ☐ | ☐ | | ☐ | | | ☐ | | |
| GP - General Securities Principal (S24) | ☐ | | ☐ | ☐ | ☐ | | | ☐ | | |
| IP - Investment Company and Variable Contracts Products Principal (S26) | ☐ | | ☐ | | ☐ | | | | | |
| FA - Foreign Associate | ☐ | | | | | | | | | |
| FN - Financial and Operations Principal (S27) | ☐ | | ☐ | ☐ | ☐ | | ☐ | ☐ | | |
| FI - Introducing Broker-Dealer/Financial and Operations Principal (S28) | ☐ | | | | ☐ | | | ☐ | | |
| RS - Research Analyst (S86, S87) | ☐ | ☐ | | | | | | | | |
| RP - Research Principal | ☐ | | | | | | | | | |
| DP - Direct Participation Program Principal (S39) | ☐ | | ☐ | | ☐ | | | ☐ | | |
| OR - Options Representative (S42) | ☐ | | | ☐ | | | | ☐ | | |
| **REGISTRATION CATEGORY** | **NASD** | **NYSE** | **AMEX** | **BSE** | **NSX** | **PCX** | **CBOE** | **CHX** | **PHLX** | **ISE** |
| MR - Municipal Securities Representative (S52) | ☐ | ☐ | ☐ | | ☐ | | | ☐ | | |
| MP - Municipal Securities Principal (S53) | ☐ | | ☐ | | ☐ | | | ☐ | | |

| | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| CS - Corporate Securities Representative (S62) | ☐ | | ☐ | | ☐ | | | ☐ | | |
| RG - Government Securities Representative (S72) | ☐ | | | | | | | | | |
| PG - Government Securities Principal (S73) | ☐ | | | | | | | | | |
| SA - Supervisory Analyst (S16) | ☐ | ☐ | ☐ | | | | | | | |
| PR - Limited Representative - Private Securities Offerings (S82) | ☐ | | ☐ | | | | | | | |
| CD - Canada-Limited General Securities Registered Representative (S37) | ☐ | ☐ | ☐ | | | ☐ | ☐ | | | |
| CN - Canada-Limited General Securities Registered Representative (S38) | ☐ | ☐ | ☐ | | | ☐ | ☐ | | | |
| **REGISTRATION CATEGORY** | **NASD** | **NYSE** | **AMEX** | **BSE** | **NSX** | **PCX** | **CBOE** | **CHX** | **PHLX** | **ISE** |
| ET - Equity Trader (S55) | ☐ | | ☐ | | ☐ | | | | | |
| AM - Allied Member | | ☐ | ☐ | | | | | | | |
| AP - Approved Person | | ☐ | ☐ | | | | | | | |
| LE - Securities Lending Representative | | ☐ | ☐ | | | | | | | |
| LS - Securities Lending Supervisor | | ☐ | ☐ | | | | | | | |
| ME - Member Exchange | | ☐ | ☐ | ☐ | ☐ | | | | | |
| FE - Floor Employee | | ☐ | ☐ | ☐ | ☐ | | | | | |
| OF - Officer | | ☐ | ☐ | | ☐ | | | | | |
| CO - Compliance Official (S14) | | ☐ | | | | | | | | |
| **REGISTRATION CATEGORY** | **NASD** | **NYSE** | **AMEX** | **BSE** | **NSX** | **PCX** | **CBOE** | **CHX** | **PHLX** | **ISE** |
| CF - Compliance Official Specialist (S14A) | | ☐ | | | | | | | | |
| PM - Floor Member Conducting Public Business | | ☐ | ☐ | | | | | | | |
| PC - Floor Clerk Conducting Public Business | | ☐ | ☐ | | | | | | | |
| SC - Specialist Clerk (S21) | | ☐ | ☐ | | | | | | | |
| TA - Trading Assistant (S25) | | ☐ | | | | | | | | |
| SF - Single Stock Futures (S43) | ☐ | | | | | | | | | |
| FP - Municipal Fund (S51) | ☐ | | | | | | | | | |
| IF - In-Firm Delivery Proctor | ☐ | ☐ | | | | | | | | |
| MM - Market Maker | | | | | | ☐ | | | | |
| **REGISTRATION CATEGORY** | **NASD** | **NYSE** | **AMEX** | **BSE** | **NSX** | **PCX** | **CBOE** | **CHX** | **PHLX** | **ISE** |
| FB - Floor Broker | | | | | | ☐ | | | | |

| | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| MB - Market Maker acting as Floor Broker | | | | | | ☐ | | | | |
| Other ________________ (Paper Form Only) | | | | | | | | | | |

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## 5. JURISDICTION REGISTRATION

**Check appropriate *jurisdiction(s)* for broker-dealer agent (AG) and/or investment adviser representative (RA) registration requests.**

| JURISDICTION | AG | RA |
|---|---|---|
| Alabama | ☐ | ☐ |
| Alaska | ☐ | ☐ |
| Arizona | ☑ | ☐ |
| Arkansas | ☐ | ☐ |
| California | ☑ | ☑ |
| Colorado | ☐ | ☐ |
| Connecticut | ☐ | ☐ |
| Delaware | ☐ | ☐ |
| District of Columbia | ☐ | ☐ |
| Florida | ☐ | ☐ |
| Georgia | ☐ | ☐ |
| Hawaii | ☐ | ☐ |
| Idaho | ☑ | ☐ |
| Illinois | ☐ | ☐ |
| Indiana | ☐ | ☐ |
| Iowa | ☐ | ☐ |
| Kansas | ☐ | ☐ |
| Kentucky | ☐ | ☐ |
| Louisiana | ☐ | ☐ |
| Maine | ☑ | ☐ |
| Maryland | ☐ | ☐ |
| Massachusetts | ☐ | ☐ |
| Michigan | ☐ | ☐ |
| Minnesota | ☑ | ☐ |
| Mississippi | ☐ | ☐ |
| Missouri | ☐ | ☐ |
| Montana | ☐ | ☐ |
| Nebraska | ☐ | ☐ |
| Nevada | ☑ | ☐ |
| New Hampshire | ☐ | ☐ |
| New Jersey | ☑ | ☐ |
| New Mexico | ☐ | ☐ |
| New York | ☑ | ☐ |
| North Carolina | ☐ | ☐ |
| North Dakota | ☐ | ☐ |
| Ohio | ☐ | ☐ |
| Oklahoma | ☐ | ☐ |
| Oregon | ☑ | ☐ |
| Pennsylvania | ☐ | ☐ |
| Puerto Rico | ☐ | ☐ |
| Rhode Island | ☐ | ☐ |
| South Carolina | ☐ | ☐ |
| South Dakota | ☐ | ☐ |
| Tennessee | ☐ | ☐ |
| Texas | ☐ | ☐ |
| Utah | ☐ | ☐ |
| Vermont | ☐ | ☐ |
| Virginia | ☐ | ☐ |
| Washington | ☐ | ☐ |
| West Virginia | ☐ | ☐ |
| Wisconsin | ☐ | ☐ |
| Wyoming | ☐ | ☐ |

**AGENT OF THE ISSUER REGISTRATION (AI)** ☐ **Indicate 2 letter *jurisdiction* code (s):__________**

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## 6. REGISTRATION REQUESTS WITH AFFILIATED FIRMS

Will *applicant* maintain registration with *firm*(s) under common ownership or control with the *filing firm*?
If "yes", fill in the details to indicate a request for registration with additional *firm*(s).

○ **Yes** ◉ **No**

No Information Filed

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## 7. EXAMINATION REQUESTS

**Scheduling or Rescheduling Examinations** Complete this section only if you are scheduling or rescheduling an examination or continuing education session. Do not select the Series 63 (S63) or Series 65 (S65) examinations in this section if you have completed Section 5 (JURISDICTION REGISTRATION) and have selected registration in a *jurisdiction*. If you have completed Section 5

(JURISDICTION REGISTRATION), and requested an AG registration in a *jurisdiction* that requires that you pass the S63 examination, an S63 examination will be automatically scheduled for you upon submission of this Form U4. If you have completed Section 5 (JURISDICTION REGISTRATION), and requested an RA registration in a *jurisdiction* that requires that you pass the S65 examination, an S65 examination will be automatically scheduled for you upon submission of this Form U4.

| | | | | | |
|---|---|---|---|---|---|
| ☐ **S3** | ☐ **S11** | ☐ **S22** | ☐ **S32** | ☐ **S46** | ☐ **S66** |
| ☐ **S4** | ☐ **S12** | ☐ **S23** | ☐ **S33** | ☐ **S51** | ☐ **S72** |
| ☐ **S5** | ☐ **S14** | ☐ **S24** | ☐ **S37** | ☐ **S52** | ☐ **S73** |
| ☐ **S6** | ☐ **S14A** | ☐ **S25** | ☐ **S38** | ☐ **S53** | ☐ **S82** |
| ☐ **S7** | ☐ **S15** | ☐ **S26** | ☐ **S39** | ☐ **S55** | ☐ **S86** |
| ☐ **S7A** | ☐ **S16** | ☐ **S27** | ☐ **S42** | ☐ **S62** | ☐ **S87** |
| ☐ **S9** | ☐ **S17** | ☐ **S28** | ☐ **S43** | ☐ **S63** | ☐ **S101** |
| ☐ **S10** | ☐ **S21** | ☐ **S30** | ☐ **S44** | ☐ **S65** | ☐ **S106** |
| | | ☐ **S31** | ☐ **S45** | | ☐ **S201** |

Other ______________________ (Paper Form Only)

| | |
|---|---|
| OPTIONAL: Foreign Exam City ____________ | Date (MM/DD/YYYY) __________ |

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## 8. PROFESSIONAL DESIGNATIONS

**Select each designation you currently maintain.**

☐ **Certified Financial Planner**

☐ **Chartered Financial Consultant (ChFC)**

☐ **Personal Financial Specialist (PFS)**

☐ **Chartered Financial Analyst (CFA)**

☐ **Chartered Investment Counselor (CIC)**

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## 9. IDENTIFYING INFORMATION/NAME CHANGE

| | | |
|---|---|---|
| **First Name:** GAIL | **Middle Name:** ANN | **Last Name:** STRUTHERS |
| **Suffix:** | **Date of Birth (MM/DD/YYYY)** 11/26/1967 | |
| **State/Province of Birth** UNKNOWN | **Country of Birth** | **Sex** ○ Male ◉ Female |
| **Height (ft)** 5 | **Height (in)** 10 | **Weight (lbs)** 150 |
| **Hair Color** Red or Auburn | **Eye Color** Blue | |

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**10. OTHER NAMES**

Enter all other names that you have used or are using, or by which you are known or have been known, other than your legal name, since the age of 18. This field should include, for example, nicknames, aliases, and names used before or after marriage.

| First Name | Middle Name | Last Name | Suffix |
|---|---|---|---|
| GAIL | A | STRUTHERS | |

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**11. RESIDENTIAL HISTORY**

Starting with the current address, give all addresses for the past 5 years. Report changes as they occur.

| From | To | Street | City | State | Country | Postal Code |
|---|---|---|---|---|---|---|
| 11/2005 | PRESENT | 3546 MT EVEREST BLVD | SAN DIEGO | CA | USA | 92111 |
| 07/1998 | 11/2005 | 3567 MT. EVEREST BLVD. | SAN DIEGO | CA | UNITED STATES | 92111 |
| 11/1967 | 07/1998 | 3546 MT. EVEREST BLVD. | SAN DIEGO | CA | United States | 92111 |

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**12. EMPLOYMENT HISTORY**

Provide complete employment history for the past 10 years. Include the *firm*(s) noted in Section 1 (GENERAL INFORMATION) and Section 6 (REGISTRATION REQUESTS WITH AFFILIATED FIRMS). Include all *firm*(s) from Section 3 (REGISTRATION WITH UNAFFILIATED FIRMS). Account for all time including full and part-time employments, self-employment, military service, and homemaking. Also include statuses such as unemployed, full-time education, extended travel, or other similar statuses.
Report changes as they occur.

| From | To | Name of *Firm* or Company | *Investment-Related* business? | City | State | Country | Position |
|---|---|---|---|---|---|---|---|
| 02/2006 | PRESENT | UBS FINANCIAL SERVICES | (•) Yes ( ) No | CARLSBAD | CA | USA | FINANCIAL ADVISOR |
| 04/1997 | 02/2006 | DEAN WITTER REYNOLDS | ( ) Yes (•) No | LA JOLLA | CA | | OTHER - SALES ASSISTANT |
| 11/1997 | 02/2006 | DEAN WITTER REYNOLDS INC. | (•) Yes ( ) No | LA JOLLA | CA | | NOT PROVIDED |
| 06/1996 | 04/1997 | MESA COMMUNITY COLLEGE | ( ) Yes (•) No | SAN DIEGO | CA | | STUDENT - Student |
| 02/1995 | 06/1996 | CALIFORNIA WESTERN SCHOOL OF LAW | ( ) Yes (•) No | SAN DIEGO | CA | | OTHER - FINANCIAL AID COORD. |
| 06/1985 | 02/1995 | GOODYEAR TIRE CENTER | ( ) Yes (•) No | LAKESIDE | CA | | OTHER - OFFICE MANAGER |
| 04/1993 | 02/1995 | D.J.'S AUTO SERVCIE | ( ) Yes (•) No | SANTEE | CA | | OTHER - OFFICE MANAGFER |

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**13. OTHER BUSINESS**

Are you currently engaged in any other business either as a proprietor, partner, officer, director, employee, trustee, agent or otherwise? (Please exclude non *investment-related* activity that is exclusively charitable, civic, religious or fraternal and is recognized as tax exempt.) If YES, please provide the following details: the name of the other business, whether the business is *investment-related*, the address of the other business, the nature of the other business, your position, title, or relationship with the other business, the start date of your relationship, the approximate number of hours/month you devote to the other business, the number of hours you devote to the other business during securities trading hours, and briefly describe your duties relating to the other business.

○ **Yes** ◉ **No**

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**14. DISCLOSURE QUESTIONS**

**IF THE ANSWER TO ANY OF THE FOLLOWING QUESTIONS IS 'YES', COMPLETE DETAILS OF ALL EVENTS OR PROCEEDINGS ON APPROPRIATE DRP(S)**

**REFER TO THE EXPLANATION OF TERMS SECTION OF FORM U4 INSTRUCTIONS FOR EXPLANATIONS OF ITALICIZED TERMS.**

**Criminal Disclosure**

| | YES | NO |
|---|---|---|
| **14A. (1) Have you ever:** | | |
| (a) been convicted of or pled guilty or nolo contendere ("no contest") in a domestic, foreign, or military court to any *felony?* | ○ | ◉ |
| (b) been *charged* with any *felony?* | ○ | ◉ |
| **(2) Based upon activities that occurred while you exercised *control* over it, has an organization ever:** | | |
| (a) been convicted of or pled guilty or nolo contendere ("no contest") in a domestic or foreign court to any *felony*? | ○ | ◉ |
| (b) been *charged* with any *felony?* | ○ | ◉ |
| **14B. (1) Have you ever:** | | |
| (a) been convicted of or pled guilty or nolo contendere ("no contest") in a domestic, foreign or military court to a *misdemeanor involving:* investments or an *investment-related* business or any fraud, false statements or omissions, wrongful taking of property, bribery, perjury, forgery, counterfeiting, extortion, or a conspiracy to commit any of these offenses? | ○ | ◉ |
| (b) been *charged* with a *misdemeanor* specified in 14B(1)(a)? | ○ | ◉ |
| **(2) Based upon activities that occurred while you exercised *control* over it, has an organization ever:** | | |
| (a) been convicted of or pled guilty or nolo contendere ("no contest") in a domestic or foreign court to a *misdemeanor* specified in 14B(1)(a)? | ○ | ◉ |
| (b) been *charged* with a *misdemeanor* specified in 14B(1)(a)? | ○ | ◉ |

**Regulatory Action Disclosure**

| | YES | NO |
|---|---|---|
| **14C. Has the U.S. Securities and Exchange Commission or the Commodity** | | |

**Futures Trading Commission ever:**

*Investment-Related*
**INVESTMENT-RELATED** pertains securities, commodities, ... More

(1) *found* you to have made a false statement or omission?

(2) *found* you to have been *involved* in a violation of its regulations or statutes?

(3) *found* you to have been a cause of an *investment-related* business having its authorization to do business denied, suspended, revoked, or restricted?

(4) entered an *order* against you in connection with *investment-related* activity?

(5) imposed a civil money penalty on you, or *ordered* you to cease and desist from any activity?

**14D(1) Has any other Federal regulatory agency or any state regulatory agency or *foreign financial regulatory authority* ever:**

(a) *found* you to have made a false statement or omission or been dishonest, unfair or unethical?

(b) *found* you to have been *involved* in a violation of *investment-related* regulation(s) or statute(s)?

(c) *found* you to have been a cause of an *investment-related* business having its authorization to do business denied, suspended, revoked or restricted?

(d) entered an *order* against you in connection with an *investment-related* activity?

(e) denied, suspended, or revoked your registration or license or otherwise, by *order*, prevented you from associating with an *investment-related* business or restricted your activities?

**14D(2) Have you been subject to any *final order* of a state securities commission (or any agency or officer performing like functions), state authority that supervises or examines banks, savings associations, or credit unions, state insurance commission (or any agency or office performing like functions), an appropriate *federal banking agency*, or the National Credit Union Administration, that:**

(a) bars you from association with an entity regulated by such commission, authority, agency, or officer, or from engaging in the business of securities, insurance, banking, savings association activities, or credit union activities; or

(b) constitutes a *final order* based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct?

**14E. Has any *self-regulatory organization* or commodities exchange ever:**

(1) *found* you to have made a false statement or omission?

(2) *found* you to have been *involved* in a violation of its rules (other than a violation designated as a *"minor rule violation"* under a plan approved by the U.S. Securities and Exchange Commission)?

(3) *found* you to have been the cause of an *investment-related* business having its authorization to do business denied, suspended, revoked or restricted?

(4) disciplined you by expelling or suspending you from membership, barring or suspending your association with its members, or restricting your activities?

**14F. Have you ever had an authorization to act as an attorney, accountant or federal contractor that was revoked or suspended?**

**14G. Have you been notified, in writing, that you are now the subject of any:**

(1) regulatory complaint or *proceeding* that could result in a "yes" answer to any part of 14C, D or E? *(If yes, complete the Regulatory Action Disclosure Reporting Page.)*

(2) *investigation* that could result in a "yes" answer to any part of 14A, B, C, D or E? *(If yes, complete the Investigation Disclosure Reporting Page.)*

**Civil Judicial Disclosure**

**14H. (1) Has any domestic or foreign court ever:** **YES NO**

(a) *enjoined* you in connection with any *investment-related* activity?

(b) *found* that you were *involved* in a violation of any *investment-related* statute(s) or regulation(s)?

(c) dismissed, pursuant to a settlement agreement, an *investment-related* civil action brought against you by a state or *foreign financial regulatory authority*?

**(2) Are you named in any pending *investment-related* civil action that could result in a "yes" answer to any part of 14H(1)?**

**Customer Complaint/Arbitration/Civil Litigation Disclosure**

**14I. (1) Have you ever been named as a respondent/defendant in an *investment-related*, consumer-initiated arbitration or civil litigation which alleged that you were *involved* in one or more *sales practice violations* and which:** **YES NO**

(a) is still pending, or;

(b) resulted in an arbitration award or civil judgment against you, regardless of amount, or;

(c) was settled for an amount of $10,000 or more?

**(2) Have you ever been the subject of an *investment-related*, consumer-initiated complaint, not otherwise reported under question 14I(1) above, which alleged that you were *involved* in one or more *sales practice violations*, and which complaint was settled for an amount of $10,000 or more?**

**(3) Within the past twenty four (24) months, have you been the subject of an *investment-related*, consumer-initiated, written complaint, not otherwise reported under question 14I(1) or (2) above, which:**

(a) alleged that you were *involved* in one or more *sales practice violations* and contained a claim for compensatory damages of $5,000 or more (if no damage amount is alleged, the complaint must be reported unless the firm has made a good faith determination that the damages from the alleged conduct would be less than $5,000), or;

(b) alleged that you were *involved* in forgery, theft, misappropriation or conversion of funds or securities?

**Termination Disclosure**

**14J. Have you ever voluntarily *resigned*, been discharged or permitted to *resign* after allegations were made that accused you of:** **YES NO**

(1) violating *investment-related* statutes, regulations, rules, or industry standards of conduct?

(2) fraud or the wrongful taking of property?

| | | |
|---|---|---|
| (3) failure to supervise in connection with *investment-related* statutes, regulations, rules or industry standards of conduct? | ○ | ◉ |

**Financial Disclosure**

| **14K. Within the past 10 years:** | **YES** | **NO** |
|---|---|---|
| (1) have you made a compromise with creditors, filed a bankruptcy petition or been the subject of an involuntary bankruptcy petition? | ○ | ◉ |
| (2) based upon events that occurred while you exercised *control* over it, has an organization made a compromise with creditors, filed a bankruptcy petition or been the subject of an involuntary bankruptcy petition? | ○ | ◉ |
| (3) based upon events that occurred while you exercised *control* over it, has a broker or dealer been the subject of an involuntary bankruptcy petition, or had a trustee appointed, or had a direct payment procedure initiated under the Securities Investor Protection Act? | ○ | ◉ |
| **14L. Has a bonding company ever denied, paid out on, or revoked a bond for you?** | ○ | ◉ |
| **14M. Do you have any unsatisfied judgments or liens against you?** | ○ | ◉ |

Rev. Form U4 (10/2005)

**15. SIGNATURE SECTION**

Please Read Carefully

All signatures required on this Form U4 filing must be made in this section.

A "signature" includes a manual signature or an electronically transmitted equivalent. For purposes of an electronic form filing, a signature is effected by typing a name in the designated signature field. By typing a name in this field, the signatory acknowledges and represents that the entry constitutes in every way, use, or aspect, his or her legally binding signature.

15A INDIVIDUAL/APPLICANT'S ACKNOWLEDGMENT AND CONSENT
This section must be completed on all initial or Temporary Registration form filings.

15B FIRM/APPROPRIATE SIGNATORY REPRESENTATIONS
This section must be completed on all initial or Temporary Registration form filings.

15C TEMPORARY REGISTRATION ACKNOWLEDGMENT
This section must be completed on Temporary Registration form filings to be able to receive Temporary Registration.

15D INDIVIDUAL/APPLICANT'S AMENDMENT ACKNOWLEDGMENT AND CONSENT
This section must be completed on any amendment filing that amends any information in Section 14 (Disclosure Questions) or any Disclosure Reporting Page (DRP).

15E FIRM/APPROPRIATE SIGNATORY AMENDMENT REPRESENTATIONS
This section must be completed on all amendment form filings.

15F FIRM/APPROPRIATE SIGNATORY CONCURRENCE
This section must be completed to concur with a U4 filing made by another *firm* (IA/BD) on behalf of an individual that is also registered with that other *firm* (IA/BD).

**15A. INDIVIDUAL/APPLICANT'S ACKNOWLEDGMENT AND CONSENT**

1. I swear or affirm that I have read and understand the items and instructions on this form and that my answers (including attachments) are true and complete to the best of my knowledge. I understand that I am subject to administrative, civil or criminal penalties if I give false or misleading answers.

2. I apply for registration with the *jurisdictions* and *SROs* indicated in Section 4 (SRO REGISTRATION) and Section 5 (JURISDICTION REGISTRATION) as may be amended from time to time and, in consideration of the *jurisdictions* and *SROs* receiving and considering my application, I submit to the authority of the *jurisdictions* and *SROs* and agree to comply with all provisions, conditions and covenants of the statutes, constitutions, certificates of incorporation, by-laws and rules and regulations of the *jurisdictions* and *SROs* as they are or may be adopted, or amended from time to time. I further agree to be subject to and comply with all requirements, rulings, orders, directives and decisions of, and penalties, prohibitions and limitations imposed by the *jurisdictions* and *SROs*, subject to right of appeal or review as provided by law.

3. I agree that neither the *jurisdictions* or *SROs* nor any person acting on their behalf shall be liable to me for action taken or omitted to be taken in official capacity or in the scope of employment, except as otherwise provided in the statutes, constitutions, certificates of incorporation, by-laws or the rules and regulations of the *jurisdictions* and *SROs.*

4. I authorize the *jurisdictions*, *SROs*, and the *designated entity* to give any information they may have concerning me to any employer or prospective employer, any federal, state or municipal agency, or any other *SRO* and I release the *jurisdictions*, *SROs*, and the *designated entity*, and any person acting on their behalf from any and all liability of whatever nature by reason of furnishing such information.

5. I agree to arbitrate any dispute, claim or controversy that may arise between me and my *firm*, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the *SROs* indicated in Section 4 (SRO REGISTRATION) as may be amended from time to time and that any arbitration award rendered against me may be entered as a judgment in any court of competent *jurisdiction.*

6. For the purpose of complying with the laws relating to the offer or sale of securities or commodities or investment advisory activities, I irrevocably appoint the administrator of each *jurisdiction* indicated in Section 5 (JURISDICTION REGISTRATION) as may be amended from time to time, or such other person designated by law, and the successors in such office, my attorney upon whom may be served any notice, process, pleading, subpoena or other document in any action or *proceeding*against me arising out of or in connection with the offer or sale of securities or commodities, or investment advisory activities or out of the violation or alleged violation of the laws of such *jurisdictions.* I consent that any such action or *proceeding* against me may be commenced in any court of competent *jurisdiction*and proper venue by service of process upon the appointee as if I were a resident of, and had been lawfully served with process in the *jurisdiction.* I request that a copy of any notice, process, pleading, subpoena or other document served hereunder be mailed to my current residential address as reflected in this form or any amendment thereto.

7. I consent that the service of any process, pleading, subpoena, or other document in any *investigation*or administrative *proceeding*conducted by the SEC, CFTC or a *jurisdiction*or in any civil action in which the SEC, CFTC or a *jurisdiction*are plaintiffs, or the notice of any *investigation* or *proceeding*by any *SRO* against the *applicant*, may be made by personal service or by regular, registered or certified mail or confirmed telegram to me at my most recent business or home address as reflected in this Form U4, or any amendment thereto, by leaving such documents or notice at such address, or by any other legally permissible means.

I further stipulate and agree that any civil action or administrative *proceeding* instituted by the SEC, CFTC or a *jurisdiction* may be commenced by the service of process as described herein, and that service of an administrative subpoena shall be effected by such service, and that service as aforesaid shall be taken and held in all courts and administrative tribunals to be valid and binding as if personal service thereof had been made.

8. I authorize all my employers and any other person to furnish to any *jurisdiction*, *SRO*, *designated entity*, employer, prospective employer, or any agent acting on its behalf, any information they have, including without limitation my creditworthiness, character, ability, business activities, educational background, general reputation, history of my employment and, in the case of former employers, complete reasons for my termination. Moreover, I release each employer, former employer and each other person from any and all liability, of whatever nature, by reason of furnishing any of the above information, including that information reported on the Uniform Termination Notice for Securities Industry Registration (Form U5). I recognize that I may be the subject of an investigative consumer report and waive any requirement of notification with respect to any investigative consumer report ordered by any *jurisdiction*, *SRO*, *designated entity*, employer, or prospective employer. I understand that I have the right to request complete and accurate disclosure by the *jurisdiction*, *SRO*, *designated entity*, employer or prospective employer of the nature and scope of the requested investigative consumer report.

9. I understand and certify that the representations in this form apply to all employers with whom I seek registration as indicated in Section 1 (GENERAL INFORMATION) or Section 6 (REGISTRATION REQUESTS WITH AFFILIATED FIRMS) of this form. I agree to update this form by causing an amendment to be filed on a timely basis whenever changes occur to answers previously reported. Further, I represent that, to the extent any information previously submitted is not amended, the information provided in this form is currently accurate and complete.

10. I authorize any employer or prospective employer to file electronically on my behalf any information required in this form or any amendment thereto; I certify that I have reviewed and approved the information to be submitted to any *jurisdiction* or *SRO* on this Form U4 Application; I agree that I will review and approve all disclosure information that will be filed electronically on my behalf; I further agree to waive any objection to the admissibility of the electronically filed records in any criminal, civil, or administrative *proceeding*.

*Applicant* or *applicant*'s agent has typed *applicant*'s name under this section to attest to the completeness and accuracy of this record. The *applicant* recognizes that this typed name constitutes, in every way, use or aspect, his or her legally binding signature.

**Date (MM/DD/YYYY)**
02/16/2006

**Signature of Applicant**
GAIL STRUTHERS
**Printed Name** [signature]

**15B. FIRM/APPROPRIATE SIGNATORY REPRESENTATIONS**

To the best of my knowledge and belief, the *applicant* is currently bonded where required, and, at the time of approval, will be familiar with the statutes, constitution(s), rules and by-laws of the agency, *jurisdiction* or *SRO* with which this application is being filed, and the rules governing registered persons, and will be fully qualified for the position for which application is being made herein. I agree that, notwithstanding the approval of such agency, *jurisdiction*or *SRO* which hereby is requested, I will not employ the *applicant* in the capacity stated herein without first receiving the approval of any authority that may be required by law.

This *firm* has communicated with all of the *applicant*'s previous employers for the past three years and has documentation on file with the names of the persons contacted and the date of contact. In addition, I have taken appropriate steps to verify the accuracy and completeness of the information contained in and with this application.

I have provided the *applicant* an opportunity to review the information contained herein and the *applicant* has approved this information and signed the Form U4.

| **Date** (MM/DD/YYYY) | **Signature of *Appropriate Signatory*** |
|---|---|
| 02/16/2006 | LEE TRIPODI |
| | **Printed Name** |

## 15C. TEMPORARY REGISTRATION ACKNOWLEDGMENT

If an *applicant* has been registered in a *jurisdiction* or *self regulatory organization (SRO)* in the 30 days prior to the date an application for registration is filed with the Central Registration Depository or Investment Adviser Registration Depository, he or she may qualify for a Temporary Registration to conduct securities business in that *jurisdiction* or *SRO* if this acknowledgment is executed and filed with the Form U4 at the *applicant*'s *firm*.

This acknowledgment must be signed only if the *applicant* intends to apply for a Temporary Registration while the application for registration is under review.

I request a Temporary Registration in each *jurisdiction* and/or *SRO* requested on this Form U4, while my registration with the *jurisdiction*(s) and/or *SRO*(s) requested is under review;

I am requesting a Temporary Registration with the *firm* filing on my behalf for the *jurisdiction*(s) and/or *SRO*(s) noted in Section 4 (SRO REGISTRATION) and/or Section 5 (JURISDICTION REGISTRATION) of this Form U4;

I understand that I may request a Temporary Registration only in those *jurisdiction*(s) and/or *SRO*(s) in which I have been registered with my prior *firm* within the previous 30 days;

I understand that I may not engage in any securities activities requiring registration in a *jurisdiction* and/or *SRO* until I have received notice from the CRD or IARD that I have been granted a Temporary Registration in that *jurisdiction* and/or *SRO*;

I agree that until the Temporary Registration has been replaced by a registration, any *jurisdiction* and/or *SRO* in which I have applied for registration may withdraw the Temporary Registration;

If a *jurisdiction* or *SRO* withdraws my Temporary Registration, my application will then be held pending in that *jurisdiction* and/or *SRO* until its review is complete and the registration is granted or denied, or the application is withdrawn;

I understand and agree that, in the event my Temporary Registration is withdrawn by a *jurisdiction* and/or *SRO*, I must immediately cease any securities activities requiring a registration in that *jurisdiction* and/or *SRO* until it grants my registration;

I understand that by executing this Acknowledgment I am agreeing not to challenge the withdrawal of a Temporary Registration; however, I do not waive any right I may have in any *jurisdiction* and/or *SRO* with respect to any decision by that *jurisdiction* and/or *SRO* to deny my application for registration.

| **Date** (MM/DD/YYYY) | **Signature of *Applicant*** |
|---|---|
| 02/16/2006 | GAIL STRUTHERS |
| | **Printed Name** |

Rev. Form U4 (10/2005)

## CRIMINAL DRP

No Information Filed

Rev. Form U4 (10/2005)

**REGULATORY ACTION DRP**

No Information Filed

Rev. Form U4 (10/2005)

**CIVIL JUDICIAL DRP**

No Information Filed

Rev. Form U4 (10/2005)

**CUSTOMER COMPLAINT/ARBITRATION/CIVIL LITIGATION DRP**

No Information Filed

Rev. Form U4 (10/2005)

**TERMINATION DRP**

No Information Filed

Rev. Form U4 (10/2005)

**INVESTIGATION DRP**

No Information Filed

Rev. Form U4 (10/2005)

**BANKRUPTCY/SIPC/COMPROMISE WITH CREDITORS DRP**

No Information Filed

Rev. Form U4 (10/2005)

**BOND DRP**

No Information Filed

Rev. Form U4 (10/2005)

**JUDGMENT LIEN DRP**

No Information Filed

James A. Goodman CA State Bar No. 89715
Kathryn T. McGuigan CA State Bar No. 232112
EPSTEIN BECKER & GREEN, P.C.
1925 Century Park East, Suite 500
Los Angeles, California 90067-2506
Telephone: 310.556.8861
Facsimile: 310.553.2165
jgoodman@ebglaw.com
kmcguigan@ebglaw.com

Attorney for Defendant
UBS FINANCIAL SERVICES INC.
(improperly pled as "UBS Financial Services, Inc.")

**UNITED STATES DISTRICT COURT**

**SOUTHERN DISTRICT OF CALIFORNIA**

| | |
|---|---|
| GAIL STRUTHERS, an individual,<br>Plaintiff,<br>v.<br>UBS FINANCIAL SERVICES, INC., a corporation; and DOES 1 through 10, inclusive,<br>Defendants. | CASE NO. 08cv1381 H (JMA)<br>Judge Marilyn L. Huff<br>**DECLARATION OF STEPHEN D. BIRD IN SUPPORT OF DEFENDANT UBS FINANCIAL SERVICES INC.'S NOTICE OF MOTION AND MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS**<br>**DATE: October 6, 2008**<br>**TIME: 10:30 a.m.**<br>**CRTR: 13** |

# DECLARATION OF STEPHEN D. BIRD

I, Stephen D. Bird declare as follows:

1. I am employed by Defendant UBS Financial Services, Inc. ("Defendant) as Director and Associate General Counsel. Except as otherwise noted, I have personal knowledge of the facts set forth in this declaration and, if called as a witness, could and would testify competently to such facts under oath.

2. On March 13, 2006, when Plaintiff Gail Struthers ("Plaintiff") signed the Promissory Note ("Note"), New York was the Defendant's principal place of business. New York remained Defendant's principal place of business until approximately February 2007.

3. I am informed and believe that on or about May 25, 2007, the UBSFS Asset Recovery Unit sent a letter to Plaintiff demanding repayment of any and all amounts due and owing under the Note. A true and correct copy of the May 25, 2007 letter sent to Plaintiff by the UBSFS Asset Recover Unit is attached hereto as Exhibit 3.

4. When Plaintiff did not repay the amounts due under the Note, UBSFS filed a Statement of Claim on October 4, 2007 for breach of contract against Plaintiff with FINRA for Plaintiff's failure to pay the amount outstanding under the Note. A true and correct copy of the Statement of Claim is attached hereto as Exhibit 4.

5. Plaintiff answered the Statement of Claim on January 30, 2008. A true and correct copy of Plaintiff's answer to the Statement of Claim is attached hereto as Exhibit 5.

6. Plaintiff retained counsel who appeared in the arbitration as of March 3, 2008. A true and correct copy of Plaintiff's Notice of Appearance in arbitration is attached hereto as Exhibit 6.

7. On March 6, 2008, Plaintiff filed but did not serve the Complaint in this action. A true and correct copy of Plaintiff's Complaint is attached hereto as Exhibit 7.

8. On March 31, 2008, Struthers filed a Counter-Claim in arbitration alleging eight causes of action, the six she alleged in her Superior Court action, and two more for partial rescission and unlawfully preventing employment by misrepresentation. Plaintiff paid the $200.00 filing fee when she filed her Counter-Claim which Plaintiff's counsel acknowledged paying in a letter dated April 28, 2008 to FINRA. I was copied on the April 28, 2008 letter by facsimile . A true and correct copy of Plaintiff's Counter-Claim is attached hereto as Exhibit 8. A true and correct copy of Plaintiff's counsel's April 28, 2008 letter is attached hereto as Exhibit 9.

9. On May 30, 2008, UBSFS filed and served its Answer in arbitration to Struther's Counter-Claim. A true and correct copy of UBSF's Answer to Plaintiff's Counter-Claim is attached hereto as Exhibit 10.

10. On July 1, 2008, Plaintiff filed and served the First Amended Complaint ("FAC") alleging the same eight causes of action as she alleged in her Counter-Claim in arbitration. A true and correct copy of Plaintiff's FAC is attached hereto as Exhibit 11.

11. On July 23, 2008, Plaintiff's counsel advised me by e-mail that Plaintiff would not dismiss or stay her FAC pending the outcome of the arbitration. A true and correct copy of Plaintiff's counsel's July 23, 2008 e-mail is attached hereto as Exhibit 12.

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I declare under penalty of perjury under the laws of the State of California and of the United States that the foregoing is true correct.

Executed this 8th of September, 2008 in Weehawken, New Jersey

STEPHEN D. BIRD

*Gail Struthers v. UBS Financial Services, Inc.*
United States District Court - CASE NO. 08cv1381 H (JMA)

Judge Marilyn L. Huff

Courtroom 13

**DEFENDANT UBS FINANCIAL SERVICES INC.'S NOTICE OF MOTION AND MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATIONS OF JENNIFER NIES AND STEPHEN D. BIRD IN SUPPORT OF THEREOF**

# EXHIBIT "3"

UBS Wealth Management

UBS Financial Services Inc.
1200 Harbor Boulevard
Weehawken, NJ 07086-6791
Tel. 201-352-3000

www.ubs.com

**CERTIFIED MAIL**
**RETURN RECEIPT REQUESTED**

May 25, 2007

Mr. Gail Struthers
3546 Mt Everest Blvd.
San Diego, CA 92111

Re: **Promissory Notes with UBS Financial Services Inc.**

Dear Ms. Struthers:

I am writing to you concerning certain matters that have arisen in the wake of the termination of your employment with UBS Financial Services Inc., formerly known as UBS PaineWebber Inc. ("UBS Financial Services"), on May 15, 2007. As you are aware, while you were employed by UBS Financial Services, you executed one Promissory Notes (the "Notes"), Note #99102, copies of which are enclosed, in exchange for monies loaned to you by UBS Financial Services. You have violated the terms of your Notes by failing to repay the outstanding balance on the Notes, totaling $326,696.44, upon your termination from UBS Financial Services.

Either you or your legal representative should contact me at 201-352-5809 if you wish to resolve this matter informally. If you do not do so, UBS may take further legal steps to enforce and protect its rights.

Please be advised that this letter constitutes a demand for arbitration and notice of intent to arbitrate this matter pursuant to Section 7503(c) of the New York Civil Practice Law and Rules ("CPLR"). You are obliged to submit all matters relating to your employment or termination to arbitration at the request of UBS Financial Services by virtue of the Promissory Note you executed.

Pursuant to Section 7503(c) of the CPLR, unless, within twenty (20) days after service of this demand for arbitration and notice of intention to arbitrate you apply to stay the arbitration herein, you will thereafter be precluded from objecting that a valid agreement to arbitrate was not made or has been

UBS Wealth Management

UBS Financial Services Inc.
1200 Harbor Boulevard
Weehawken, NJ 07086-6791
Tel. 201-352-3000

www.ubs.com

May 25, 2007

complied with and from asserting in court any bar to litigation on the applicable statute of limitations.

Please submit payment to the following address:

**UBS Financial Services Inc.**
**Asset Recovery Unit – Legal Division**
**1200 Harbor Bv. – 10/1200**
**Weehawken, NJ 07086**
**Attn: Richard Maloney, Esq.**

If you wish to discuss this matter, I invite you or your legal representative to call me at (201) 352-5802.

Very truly yours,
**UBS Financial Services Inc.**

John Sfera
**Director**
**Asset Recovery Unit Manager**
**Legal Division**

Enclosures

UBS Financial Services Inc. is a subsidiary of UBS AG.

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# Track & Confirm

## Search Results

Label/Receipt Number: **7005 1820 0008 0155 4228**
Detailed Results:

- **Delivered, May 31, 2007, 11:18 am, SAN DIEGO, CA 92111**
- **Acceptance, May 29, 2007, 1:39 pm, UNION CITY, NJ 07087**

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| Postage | $ |
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| Return Receipt Fee (Endorsement Required) | |
| Restricted Delivery Fee (Endorsement Required) | |
| Total Postage & Fees | $ |

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Sent To Gail Struthers

Street, Apt. No.; or PO Box No. 3546 Mt Everest Blvd

City, State, ZIP+4 San Diego CA 92111

PS Form 3800, June 2002 See Reverse for Instructions

**SENDER: COMPLETE THIS SECTION**

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Gail Struthers
3546 Mt Everest Blvd
San Diego, CA 92111

**COMPLETE THIS SECTION ON DELIVERY**

A. Signature
X ☐ Agent ☐ Addressee

B. Received by (Printed Name) C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☐ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Article Number (Transfer from service label) 7005 1820 0008 0155 4228

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

*Gail Struthers v. UBS Financial Services, Inc.*
United States District Court - CASE NO. 08cv1381 H (JMA)

Judge Marilyn L. Huff

Courtroom 13

**DEFENDANT UBS FINANCIAL SERVICES INC.'S NOTICE OF MOTION AND MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATIONS OF JENNIFER NIES AND STEPHEN D. BIRD IN SUPPORT OF THEREOF**

# EXHIBIT "4"

UBS

**UBS Financial Services Inc.**
725 South Figueroa Street – Suite 4100
Los Angles, CA 90017

www.ubs.com

Legal
Employment Law and Related Litigation

Amy R. Melner
Associate Director
Assistant General Counsel
Tel. 213-253-5334
Fax. 213-253-5469
Amy.Melner@ubs.com

October 4, 2007

***VIA OVERNIGHT MAIL***

Director of Arbitration
FINRA Dispute Resolution
One Liberty Plaza
165 Broadway, 27th Floor
New York, New York 10006

Re: UBS Financial Services Inc. v. Gail Struthers

Dear Sir or Madam:

Enclosed for filing on behalf of UBS Financial Services Inc. please find an original and five (5) copies of the following:

(1) the Statement of Claim and Exhibits;

(2) the Uniform Submission Agreement; and

(3) Claim Information Sheet.

Please also find enclosed a check made payable to FINRA Dispute Resolution in the amount of $3,825.00 to cover the filing fees related to this matter. Additionally, please send a copy of the above documents marked "filed" to me in the self-addressed envelope enclosed for your convenience.

Thank you.

Respectfully submitted,

Amy Melner

Enclosures

UBS Financial Services Inc. is a subsidiary of UBS AG.

UBS

UBS Financial Services Inc.
1000 Harbor Boulevard
Weehawken, N.J. 07086
Member of all principal security, commodity and option exchanges.

| DATE | CHECK NO. |
|---|---|
| 10 02 07 3533 | 1475771 604148 |

FINRA DISPUTE RESOLUTION

| DATE | INVOICE/CREDIT MEMO | VOUCHER NO. | DESCRIPTION | GROSS | NET |
|---|---|---|---|---|---|
| 100107 | SEP07382500 | | 1900010635 | 382500 | 382500 |
| | | | TOTAL ▶ | 382500 | 382500 |

THE ATTACHED CHECK IS IN PAYMENT FOR ITEMS DESCRIBED ABOVE. DETACH AND RETAIN THIS STUB FOR YOUR RECORDS

UBS

UBS Financial Services Inc.
1000 Harbor Boulevard
Weehawken, N.J. 07086
Member of all principal security, commodity and option exchanges.
Accounts Payable

62-20
311

| CHECK NO. |
|---|
| 1475771 |

1475771

THREE THOUSAND EIGHT HUNDRED TWENTY-FIVE AND 00/100 DOLLARS **************

PAY TO THE ORDER OF

FINRA DISPUTE RESOLUTION
165 BROADWAY, 27TH FLOOR
ONE LIBERTY PLAZA
NEW YORK NY 10006

This check is not negotiable after 180 days from date issued.

| DATE | CHECK AMOUNT |
|---|---|
| 10 02 07 | *********3,825.00 |

AUTHORIZED SIGNATURE

CITIBANK NEWCASTLE, DE 19720

CHK-2285D REV. 9/03

⑈1475771⑈ ⑆031100209⑆ 38823627⑈

Amy Melner, Esq.
Claudia M. Cohen, Esq.
Valerie Fasolo, Esq.
**UBS FINANCIAL SERVICES INC.**
725 S. Figueroa Street – Ste. 4100
Los Angeles, CA 90017
213-253-5334 (Telephone)
213-253-5469 (Facsimile)

Attorneys for Claimant UBS Financial Services Inc.

**FINANCIAL INDUSTRY REGULATORY AUTHORITY**

**DISPUTE RESOLUTION**

| | |
|---|---|
| UBS FINANCIAL SERVICES INC.<br>Claimant,<br>-- against --<br>GAIL STRUTHERS<br>Respondent. | FINRA No.<br>**STATEMENT OF CLAIM** |

Claimant UBS FINANCIAL SERVICES INC. files this Statement of Claim against respondent Gail Struthers, and would respectfully show the Panel as follows:

**PARTIES**

1. UBS Financial Services Inc., formerly known as PaineWebber, Incorporated and UBS PaineWebber Inc. ("UBSFS") is, and at all relevant times hereto was, a corporation formed under the laws of the State of Delaware with its principal place of business, formerly at 1285 Avenue of the Americas, New York, New York, and currently at 1200 Harbor Boulevard, Weehawken, New Jersey.

2. Upon information and belief, respondent Gail Struthers ("Struthers") is, and at all relevant times was, a resident of San Diego, California.

## JURISDICTION

3. Paragraph 15A(5) of the Form U-4 recites an agreement to arbitrate any dispute, claim or controversy that may arise between an employee and firm that is required to be arbitrated under the rules, constitutions, or by-laws of an SRO. The Financial Industry Regulatory Authority, Inc. ("FINRA") (f/k/a/ National Association of Securities Dealers, Inc. ("NASD")) is one such SRO.

4. The claim by UBSFS against Struthers as alleged herein is a claim that is required to be arbitrated under the rules, constitutions or by-laws of the FINRA.

5. Respondent Struthers executed a Form U-4 in connection with the commencement of her employment with UBSFS on February 16, 2006 and thereby consents to the jurisdiction of the FINRA to arbitrate the instant Claim against her.

## FACTUAL ALLEGATIONS

6. As noted, on or about February 16, 2006, Struthers commenced employment with UBSFS as a Financial Advisor ("FA") in UBSFS' branch office located at 5050 Avenida Encinas, Carlsbad, California.

7. In connection with her hire, UBSFS extended to Struthers a loan in the principal amount of $396,717.00. At or about the same time and in exchange for the loan, Struthers executed and delivered to UBSFS a written promissory note, dated March 7, 2006, and delineated as Promissory Note #99102 (the "Note"). (A true copy of the Note is attached hereto as "Exhibit A"). Struthers signed the Note on March 13, 2006.

8. Likewise, on or about March 13, 2006 and in exchange for the loan referred to above, Struthers also executed and delivered to UBSFS a written acknowledgement entitled "Employee Forgivable Loan Letter of Understanding for Gail Struthers," (the "Loan Letter of Understanding"), in which Struthers acknowledged, among other things, that she received from UBSFS a check in the amount of $396,717.00, that she understood that the "Forgivable Loan is a loan that must be repaid, unless the repayment is forgiven" and that if her "employment is terminated, the principal amount of the Forgivable Loan that remains outstanding will become immediately due and payable pursuant to the terms of the Promissory Note..." (A true copy of the Loan Letter of Understanding is attached hereto as "Exhibit B.") The Note and the Letter of Understanding are hereinafter collectively referred to as the "Loan Documents."

9. Pursuant to the terms of the Loan Documents, particularly the Note, UBSFS agreed to extend Struthers a loan in the amount of $396,717.00 and, provided that certain conditions were met, including but not limited to Struthers' continued employment with UBSFS, UBSFS agreed to forgive Struthers' repayment of the outstanding balance of the Struthers Note in six (6) equal installments of $66,119.50 on each of the following dates: March 7, 2007; March 7, 2008; March 7, 2009; March 7, 2010; March 7, 2011; and March 7, 2012.

10. The Note further provided that in the event that Struthers' employment with UBSFS is terminated, either voluntarily or involuntarily by Struthers or UBSFS, for any reason whatsoever other than disability or death, the Note shall become immediately due and payable in full, without presentment, demand, protest, notice of default or other notice

of any kind.

11. The Note further provided that in the event Struthers failed to timely pay any portion of the principal amount or any interest thereon or any other amount due and payable UBSFS thereunder, Struthers is obligated to pay interest to UBSFS on any such outstanding amount, to the extent permitted by law, calculated from the date that such payment is due and owing until paid in full at a rate equal to the rate of interest announced from time to time by Citibank, N.A. in New York, New York, as its base rate or "prime rate" of interest on loans to responsible and substantial commercial borrowers, plus two percent (2%), compounded monthly (the "Default Interest Rate").

12. Struthers' employment with UBSFS terminated as of May 17, 2007.

13. At the time that Struthers' employment with UBSFS terminated on or about May 17, 2007, the remaining outstanding balance due on the Note was $326,696.44.

14. On or about May 25, 2007, UBSFS sent to Struthers a letter demanding, among other things, repayment of any and all amounts due and owing to it under the Note. (A true copy of this letter is attached hereto as "Exhibit C.")

15. To date, Struthers has failed and refused to repay to UBSFS the amounts due and owing to it under the Note despite her clear obligation to do so.

16. The Note provided that should UBSFS be required to enforce any provisions of the Loan Documents, Struthers shall be obligated to pay any and all costs and expenses associated therewith, including, without limitation, reasonable attorney's fees and disbursements incurred by UBSFS.

17. As a result of Struthers' breach of the repayment terms of the Struthers

Note, UBSFS has been damaged in the principal amount of $326,696.44, plus interest thereon and attorneys' fees, costs and other consequential damaged incurred by UBSFS in connection with the enforcement of the Struthers Loan Documents.

## FIRST CAUSE OF ACTION

**(Breach of Contract)**

18. Paragraphs 1 through 17, inclusive, are all re-alleged as if fully set forth at length herein.

19. Struthers has failed and refused to repay to UBSFS the unforgiven and remaining portion of the Struthers Note as set forth above.

20. By reason of the foregoing and pursuant to the terms of Promissory Note #99102, UBSFS seeks money damages in the amount of $326,696.44, plus interest at the Default Interest Rate and costs and expenses, including reasonable attorney's fees.

## PRAYER FOR RELIEF

WHEREFORE, UBSFS respectfully requests:

(1) for the First Cause of Action, money damages in the amount of $326,696.44, plus interest at the Default Interest Rate and costs and expenses, including reasonable attorneys' fees;

(2) all costs, fees and disbursements, including reasonable attorneys' fees, incurred in this proceeding; and

(3) such other and further relief as this Panel may deem just and proper.

DATED: October 4, 2007

UBS FINANCIAL SERVICES INC.

By: ______________________
Amy Melner, Esq
Claudia M. Cohen, Esq.
Valerie Fasolo, Esq.
725 S. Figueroa Street
Los Angeles, CA 90017
213-253-5334 (Telephone)
Attorneys for Claimant

Exhibit A

**Promissory Note 99102**

$396,717.00 03/07/2006

FOR VALUE RECEIVED, Gail Struthers, (the "Employee") hereby promises to pay UBS Financial Services Inc., a Delaware corporation ("UBS Financial Services"), at its offices at 1285 Avenue of the Americas, New York, New York 10019, U.S.A., or assigns, the principal sum of $396,717.00 (the "Principal Amount") in one lump-sum payment on 03/07/2012, subject to required prepayment in whole or in part to the extent hereinafter provided.

**Interest Rate.** Except as hereinafter specifically provided, no interest shall be due or payable on the Principal Amount or any balance thereof.

**Interest Upon Default in Payment.** If the Employee defaults in the timely payment of any portion of the Principal Amount or any interest thereon or any other amount which is due and payable to UBS Financial Services pursuant to the terms of this Note, whether by required prepayment on any payday, at stated maturity, by acceleration or otherwise, after notice and a thirty-day cure period, the Employee shall pay interest thereon, to the extent permitted by law, from the date such payment was due until paid at an interest rate equal to the rate of interest announced from time to time by Citibank, N.A. in New York, New York, as its base rate or "prime rate" of interest on loans to responsible and substantial commercial borrowers plus two percent (2%) compounded monthly.

**Forgiveness of Principal Amount.** Notwithstanding any of the forgoing provisions of this Note, UBS Financial Services shall forgive in equal installment(s) the Principal Amount on 03/07/2007, 03/07/2008, 03/07/2009, 03/07/2010, 03/07/2011, 03/07/2012, if on such date all of the following conditions are met:

(i) the Employee has, at all times since the date of this Note remained in the full-time employ of UBS Financial Services or one or more other corporations more than 50 percent of the voting stock of which is owned, directly or indirectly, by UBS AG ("UBS"), and

(ii) this Note has not been declared by UBS Financial Services to be immediately due and payable pursuant to its option to accelerate or accelerated automatically by its terms.

If Employee's employment with UBS Financial Services or UBS shall terminate, whether voluntarily or involuntarily, other than by reason of Disability (as hereinafter defined) or death, no part of the unpaid Principal Amount shall be forgiven.

REV: 05/16/05 Initial______

**Acceleration.** This Note shall immediately become due and payable without presentment, demand, protest, notice of default or other notice of any kind, which the Employee hereby expressly waives, in the event that the Employee's employment with UBS Financial Services or UBS is terminated, either voluntarily or involuntarily by the Employee, UBS Financial Services, or UBS for any reason whatsoever other than disability or death.

In addition, UBS Financial Services, at its option, may declare this Note immediately due and payable without presentment, demand, protest, notice of default or other notice of any kind, which the Employee hereby expressly waives, if one or more of the following events shall occur:

(i) the Employee has not obtained and maintained in full force and effect all licenses and registrations from the National Association of Securities Dealers, Inc., securities exchanges, state securities commissions and other regulatory bodies as UBS Financial Services or UBS shall determine is necessary or appropriate in order for the Employee to conduct securities or commodities transactions or otherwise perform the functions for which he/she is employed; or

(ii) at any time, in the sole opinion of UBS Financial Services, the financial responsibility of the Employee has become impaired, such impairment to include, without limiting the generality of the foregoing, the filing of a voluntary or involuntary petition by or against the Employee under any provision of any Federal or state bankruptcy, insolvency, reorganization or similar laws; the appointment of a receiver to manage the Employee's property; an assignment for the benefits of creditors; the entry of judgement or lien or issuance of a warrant or an order of attachment or garnishment against the Employee or his/her property; or the commencement of any proceeding or procedure for enforcement of a money judgement against the Employee; or

(iii) the Employee defaults in the timely payment of any amount due and payable to UBS Financial Services pursuant to the terms of this Note, whether by required prepayment on any payday, at stated maturity, by acceleration or otherwise.

**Solicitation of Clients While Debt Outstanding.** Until such time as this Promissory Note #99102 has been forgiven by UBS Financial Services in full pursuant to the terms herein, or repaid by Employee to UBS Financial Services in full, or for a period of one year from Employee's termination date, whichever of these periods shall be less, Employee agrees, in the event Employee is terminated for any reason whatsoever, whether voluntarily or involuntarily, to not solicit, directly or indirectly, any of the clients who maintain accounts at UBS Financial Services ("Clients of UBS Financial Services") whom Employee serviced during his/her employment at UBS Financial Services or other Clients of UBS Financial Services Inc. whose names became known to Employee while in the employ of UBS Financial Services.

REV: 05/16/05

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"Solicit" as set forth in this paragraph means that the Employee will not initiate, whether directly or indirectly, any contact or communication of any kind whatsoever, for the purpose of inviting, encouraging or requesting a client or that may have the effect of inviting, encouraging or requesting a client:

(a) to transfer his/her UBS Financial Services account(s) to the Employee or his/her new employer; or
(b) to open a new account with Employee or his/her new employer; or
(c) to otherwise discontinue its existing business relationship with UBS Financial Services.

**Confidentiality of Client Information.** Employee further expressly agrees that in the event Employee's employment is terminated for any reason whatsoever, whether voluntarily or involuntarily, and whether or not this Note #99102 has been forgiven by UBS Financial Services in full pursuant to the terms herein, or repaid by Employee to UBS Financial Services in full, Employee may not take any records or information referring or relating to Clients of UBS Financial Services, whether originals or copies, in hard copy or computerized form, except that at such time as this Promissory Note #99102 has been forgiven by UBS Financial Services in full pursuant to the terms herein, or repaid by Employee to UBS Financial Services in full, Employee will be permitted to take a list containing only the names of clients who Employee introduced to UBS Financial Services, the addresses and telephone numbers for those clients and the title (but not account numbers) of their UBS Financial Services' accounts.

**Other Agreements.** In the event that Employee enters into other agreements with UBS Financial Services that contain non-solicitation and/or confidentiality obligations, including, but not limited to, Corporate Employee Account Servicing Agreements, Receiving and/or Retiring Financial Advisor Agreements, Financial Advisor Team Agreements, and/or Account Assignment Agreements, the non-solicitation and/or confidentiality provisions of any such agreement shall govern the Employee's conduct with respect to the solicitation of clients and use of client information covered by those Agreements.

**Remedies.** In the event that any of the provisions contained in the **Solicitation of Clients While Debt Outstanding** and/or **Confidentiality of Client Information** Paragraphs of this Note are breached by Employee, Employee understands that Employee will be liable to UBS Financial Services for any damage and/or injury, including but not limited to reasonable attorney's fees, incurred to enforce the provisions of this Note. Employee also specifically agrees that, in the event of breach of the **Solicitation of Clients While Debt Outstanding** and/or **Confidentiality of Client Information** Paragraphs of this Note, damages alone will be an inadequate remedy and UBS Financial Services will in addition to damages for past breach be entitled to injunctive or other equitable relief against Employee to enforce the provisions of these Paragraphs.

REV: 05/16/05

Initial________

EMPLOYEE FURTHER EXPRESSLY CONSENTS TO THE ISSUANCE OF A TEMPORARY RESTRAINING ORDER OR A PRELIMINARY INJUNCTION BY ANY COURT OR ARBITRATION PANEL WITH JURISDICTION OVER EMPLOYEE TO PROHIBIT THE BREACH OF ANY PROVISION OF THIS PROMISSORY NOTE, OR TO MAINTAIN THE STATUS QUO PENDING THE OUTCOME OF ANY ARBITRATION PROCEEDING WHICH MAY BE INITIATED; AND, FURTHER, THAT THE ISSUE OF TEMPORARY AND PRELIMINARY INJUNCTIVE RELIEF MAY BE DECIDED BY A COURT AND NOT BY AN ARBITRATION PANEL SHOULD UBS FINANCIAL SERVICES IN ITS DISCRETION ELECT TO SEEK SUCH RELIEF.

**Death and Disability.** If the Employee shall die or incur a Disability (which shall mean a total and permanent disability as such term is used in the UBS Financial Services Inc. Pension Plan) while a full-time employee of UBS Financial Services or UBS, then UBS Financial Services shall forgive the Principal Amount (but not any unpaid withholding and employment taxes) on the date of the Employee's death or the date the Employee incurred such Disability.

**Payments and Withholding Taxes.** To provide for the payment of the Federal, State and local income and employment taxes required to be withheld from the Employee at the time any installment of the Principal Amount may be forgiven ("Withholding Taxes"), Employee agrees to pay to UBS Financial Services or UBS (and Employee authorizes UBS Financial Services or UBS to deduct and withhold from the compensation otherwise due to Employee) on each payday a proportionate part of the Withholding Taxes due upon the forgiveness of the next installment of the Principal Amount. UBS Financial Services or UBS shall notify the Employee of the estimated amount of Withholding Taxes and the amount of each payment to be deducted on each payday. If on the date any installment of Principal Amount is to be forgiven the amount theretofore paid by (or deducted from) Employee to UBS Financial Services or UBS is less than the amount of Withholding Taxes due with respect to the amount forgiven, Employee shall promptly pay any deficiency to UBS Financial Services or UBS, and if the amount paid is in excess of the amount of Withholding due, UBS Financial Services or UBS shall promptly pay such excess to Employee.

Before a particular installment of the Principal Amount has been forgiven, all amounts the Employee paid to UBS Financial Services as Withholding Taxes shall be applied as payments on account of the Principal Amount. The payment to UBS Financial Services by Employee of any Withholding Taxes on account shall not obligate UBS Financial Services to forgive all or any part of the Principal Amount on any installment date unless and until all of the conditions to the forgiveness of any Principal Amount are satisfied in full.

**Default and Collection and Waivers.** The Employee agrees to pay any and all costs and expenses, including without limitation, reasonable attorney's fees and disbursements, incurred by UBS Financial Services in connection with the enforcement of any and all provisions of this Note and in regard to any defenses to the Note or counterclaims brought in the action to enforce the Note.

The Employee hereby waives (i) all benefits of any law exempting his/her property, or any part of it, from attachment, garnishment, or execution, and (ii) trial by jury and the right to interpose any defense, set-off or counterclaim of any nature or description in any action arising out of or relating to this Note in which UBS Financial Services is an adverse party.

REV: 05/16/05

Initials ________

**Arbitration.** With the exception of claims for injunctive relief under this Agreement, Employee and UBS Financial Services agree that any disputes between Employee and UBS Financial Services including claims concerning compensation, benefits or other terms or conditions of employment and termination of employment, or any claims for discrimination, retaliation or harassment, or any other claims whether they arise by statute or otherwise, including but not limited to, claims arising under Title VII of the Civil Rights Act of 1964, as amended, The Age Discrimination in Employment Act of 1967, The Worker Adjustment and Retraining Notification Act, The Employee Retirement Income Security Act, The Americans With Disabilities Act, The Equal Pay Act of 1963, The Americans With Disabilities Act of 1990, The Family and Medical Leave Act of 1993, The Sarbanes-Oxley Act, or any other federal, state or local employment or discrimination laws, rules or regulations, including wage and hour laws, will be determined by arbitration as authorized and governed by the arbitration law of the state of New York. Any such arbitration will be conducted under the auspices and rules of The NASD, Inc. If for any reason, the NASD is unavailable or unable to hear the matter, then the appropriate forum is The New York Stock Exchange Inc., to the extent that forum is available. Subject to the parties' right to appeal or seek vacatur under applicable law, Employee and UBS Financial Services agree that the decision of the Arbitrator(s) will be final and binding on both or all parties.

All claims based upon allegations of unlawful discrimination, retaliation, or harassment which include all bases of discrimination under federal law and under the laws of the state or localities in which you work, including, for example, age, race, disability, national origin, religion, and sex (some of the statutes that provide for such claims are Title VII of the Civil Rights Act of 1964, as amended, the Age Discrimination in Employment Act of 1967, The Americans With Disabilities Act, the Equal Pay Act of 1963, and the Family & Medical Leave Act) are eligible for the Employee's voluntary submission to UBS Financial Services Inc.'s Forum for Alternate Issue Resolution (UBS Financial Services Inc. F.A.I.R.) for resolution, prior to the filing of NASD proceedings.

**Not an Employment Contract.** The Employee expressly acknowledges that this Note is not an employment contract or an agreement to employ him/her for a specified period of time or a promise of continued employment with UBS Financial Services or a promise of employment with UBS for any period whatsoever.

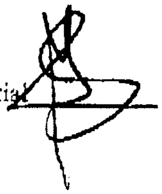
**Extensions and Waivers.** UBS Financial Services may grant extensions and/or renewals hereof at its discretion, without notice and without releasing the liability of any party hereto. However, no failure to exercise any right, no partial exercise and no delay in exercising any such right (including without limitation acceptance by UBS Financial Services of any late payment or other default), or any other course of dealing between the Employee and UBS Financial Services, shall constitute a waiver by UBS Financial Services of its right to exercise any of its options or any of its rights hereunder at any time.

**Assignment.** This Note may be assigned by UBS Financial Services and the benefits and obligations thereof shall inure to UBS Financial Services' successors and assigns.

**Terms and Modifications.** This Note contains all the terms of the agreement between the parties hereto relating to the subject matter hereof and may not be modified except by a writing signed by the party to be bound thereby.

REV: 05/16/05

Initials



**Invalid Provisions.** If any provision of this Note is held to be illegal, invalid or unenforceable under present or future laws effective during the term hereof, such provision shall be fully severable and this Note shall be construed and enforced as if such illegal, invalid or unenforceable provision had never comprised a part hereof and the remaining provisions hereof shall remain in full force and effect and shall not be affected by the illegal, invalid or unenforceable provision by its severance herefrom. Any provision of this Note that is inapplicable to an employee as a result of the fact that said employee's position with UBS Financial Services or UBS is in a non-production capacity shall not affect the balance of the Note.

**Governing Law.** This Note shall be governed by, and construed in accordance with, the laws of the State of New York but without regard to the choice of law principles thereof.

**Headings.** The headings contained in this Note are inserted for convenience only and shall not affect the meaning or interpretation of this Note

IN WITNESS WHEREOF, the undersigned has signed this Note as of the date and year first above written.

Date: 3-13-06

[signature]
Employee (Signature)

3546 Mt. Evercrest Blvd
Address

San Diego, CA 92111
City, State, Zip Code

San Diego
Country

**FOR INTERNAL USE**

[signature]
UBS Financial Services Inc. Branch/Home Manager Signature

REV: 05/16/05

Initial [initials]

## INCOME TAX WITHHOLDING CALCULATION - PAYROLL DEDUCTION

For

Gail Struthers
SS# 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

03/07/2006

You have been issued an Employee Forgivable Loan in the amount of $396,717.00. Pursuant to the terms of the Promissory Note, a Monthly deduction of $1,950.53 from your net paycheck will be made beginning 05/05/2006. The sum of these Monthly deductions will be applied against the anticipated income tax withholding obligation created upon the annual forgiveness of your loan. This anticipated obligation was calculated as follows:

$396,717.00 / 6 year period = $66,119.50 Annual forgiven amount

| Tax Entity & Supplemental Rate | Annual Tax |
|---|---|
| Federal 25.0000% | $16,529.88 |
| California 6.0000% | $3,967.17 |
| Medicare 1.4500% | $958.73 |
| Total income tax withholding obligation upon annual forgiveness: | $21,455.78 |

$21,455.78 / 11 Monthly deductions = $1,950.53 per Monthly deduction amount

These deductions will be reflected on your paycheck stub Monthly and cumulatively in the YTD. At calendar year end, you will receive a statement from HR Employee Programs Administration reflecting the total amount deducted in 2006. Beginning in January, 2007 your paycheck stub will reflect deductions as of January 1, 2007.

The Monthly deduction amount will be reviewed annually at the time of forgiveness. If a change in Federal, State or Local supplemental tax rates affects your Monthly deduction amount, you will be notified.

REV 9/16/99

This tax calculation in no way implies that your income tax withholding obligation upon forgiveness is limited to the amount deducted. It is an approximation based upon available information. The tax obligation created upon forgiveness may be either higher or lower than the total amount deducted. At the time of forgiveness, you will either receive a check for any over-deduction from UBS Financial Services Inc. or be asked to reimburse UBS Financial Services Inc. for taxes paid on your behalf, in the form of deductions from your net paycheck.

Because supplemental Federal, State and Local tax rates apply, if you are claiming exempt status for Federal tax purposes, the tax calculation will still be performed and the required payroll deductions made. If at the time of forgiveness, your payroll record indicated exempt status, you will receive a check from UBS Financial Services Inc. for the sum of the deductions made.

All payroll deductions are considered an advance against loan principal and will reduce the outstanding loan balance upon which imputed interest will be calculated at calendar year end.

*FICA tax is not included in this deduction. Income generated from a forgiven installment is considered FICA eligible wages and will be taxed accordingly.*

If you have any questions regarding this payroll deduction or the Employee Forgivable Loan Program, you may contact Earl Lafontant at (201) 352-6498.

REV 9/16/99

Exhibit B

**EMPLOYEE FORGIVABLE LOAN**
**LETTER OF UNDERSTANDING**
**FOR**
**Gail Struthers**
**Social Security No. 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**

With respect to the UBS Financial Services Inc. Forgivable Loan Program, I understand the following:

1. An Employee Forgivable Loan is a loan that must be repaid, unless repayment is forgiven.

2. If my employment is terminated and repayment is not forgiven, the principal amount of the Employee Forgivable Loan that remains outstanding will become immediately due and payable pursuant to the terms of the Promissory Note.

3. All applicable Federal, state and local taxes, which become due if all or any part of the loan is forgiven, must be paid by me, in the form of regular payroll deductions.

4. Interest will be imputed on the outstanding balance of the loan for each tax year, according to current tax laws.

5. Interest upon default will be calculated as stated in the Promissory Note.

6. UBS Financial Services will report any interest and principal that remains due and owing yet unpaid at the end of the collection efforts to the IRS as income to me.

In addition, I have received the following documents in connection with the issuance of a UBS Financial Services Inc. Employee Forgivable Loan:

1. Promissory Note;

2. UBS Financial Services Inc. Employee Forgivable Loan Program Questions and Answers;

3. An explanation of the amount of payroll deductions to be collected for the income tax withholding obligation that arises upon the forgiveness of any part of the loan;

4. Check in the amount of $396,717.00.

5. I acknowledge that if I become entitled to a back end payment from UBS Financial Services, such payment shall be in the form of an Employee Forgivable Loan and Promissory Note in a form substantially similar to the Promissory Note being provided to me.

Employee Signature: [signature]

Date: 3/13/06

REV: 05/16/05

Exhibit C

UBS Wealth Management

UBS Financial Services Inc.
1200 Harbor Boulevard
Weehawken, NJ 07086-6791
Tel. 201-352-3000

www.ubs.com

**CERTIFIED MAIL**
**RETURN RECEIPT REQUESTED**

May 25, 2007

Mr. Gail Struthers
3546 Mt Everest Blvd.
San Diego, CA 92111

**Re: Promissory Notes with UBS Financial Services Inc.**

Dear Ms. Struthers:

I am writing to you concerning certain matters that have arisen in the wake of the termination of your employment with UBS Financial Services Inc., formerly known as UBS PaineWebber Inc. ("UBS Financial Services"), on May 15, 2007. As you are aware, while you were employed by UBS Financial Services, you executed one Promissory Notes (the "Notes"), Note #99102, copies of which are enclosed, in exchange for monies loaned to you by UBS Financial Services. You have violated the terms of your Notes by failing to repay the outstanding balance on the Notes, totaling $326,696.44, upon your termination from UBS Financial Services.

Either you or your legal representative should contact me at 201-352-5809 if you wish to resolve this matter informally. If you do not do so, UBS may take further legal steps to enforce and protect its rights.

Please be advised that this letter constitutes a demand for arbitration and notice of intent to arbitrate this matter pursuant to Section 7503(c) of the New York Civil Practice Law and Rules ("CPLR"). You are obliged to submit all matters relating to your employment or termination to arbitration at the request of UBS Financial Services by virtue of the Promissory Note you executed.

Pursuant to Section 7503(c) of the CPLR, unless, within twenty (20) days after service of this demand for arbitration and notice of intention to arbitrate you apply to stay the arbitration herein, you will thereafter be precluded from objecting that a valid agreement to arbitrate was not made or has been

UBS Wealth Management

UBS Financial Services Inc.
1200 Harbor Boulevard
Weehawken, NJ 07086-6791
Tel. 201-352-3000

www.ubs.com

complied with and from asserting in court any bar to litigation on the applicable statute of limitations.

Please submit payment to the following address:

**UBS Financial Services Inc.**
**Asset Recovery Unit – Legal Division**
**1200 Harbor Bv. – 10/1200**
**Weehawken, NJ 07086**
**Attn: Richard Maloney, Esq.**

If you wish to discuss this matter, I invite you or your legal representative to call me at (201) 352-5802.

Very truly yours,
**UBS Financial Services Inc.**

John Sfera
**Director**
**Asset Recovery Unit Manager**
**Legal Division**

Enclosures

UBS Financial Services Inc. is a subsidiary of UBS AG.

UNITED STATES POSTAL SERVICE

Home | Help

Track & Confirm

# Track & Confirm

## Search Results

Label/Receipt Number: **7005 1820 0008 0155 4228**
Detailed Results:

- **Delivered, May 31, 2007, 11:18 am, SAN DIEGO, CA 92111**
- **Acceptance, May 29, 2007, 1:39 pm, UNION CITY, NJ 07087**

*< Back* *Return to USPS.com Home >*

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**CERTIFIED MAIL™ RECEIPT**
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| | |
|---|---|
| Postage | $ |
| Certified Fee | |
| Return Receipt Fee (Endorsement Required) | |
| Restricted Delivery Fee (Endorsement Required) | |
| Total Postage & Fees | $ |

Postmark Here

*Sent To* Gail Struthers
*Street, Apt. No.; or PO Box No.* 3546 Mt Everest Blvd
*City, State, ZIP+4* San Diego CA 92111

PS Form 3800, June 2002 — See Reverse for Instructions

**SENDER: *COMPLETE THIS SECTION***

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Gail Struthers
3546 Mt Everest Blvd
San Diego, CA 92111

***COMPLETE THIS SECTION ON DELIVERY***

A. Signature
X [signature] ☐ Agent ☐ Addressee

B. Received by (*Printed Name*) C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☐ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? *(Extra Fee)* ☐ Yes

2. Article Number
*(Transfer from service label)* 7005 1820 0008 0155 4228

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

FINANCIAL INDUSTRY REGULATORY
AUTHORITY, INC.

| | |
|---|---|
| UBS FINANCIAL SERVICES INC.,<br>Claimant,<br>– against –<br>GAIL STRUTHERS,<br>Respondent. | FINRA No.<br>**UNIFORM SUBMISSION AGREEMENT** |

1. The undersigned party hereby submits the present matter in controversy, as set forth in the attached Statement of Claim, Answers and all related Counterclaims and/or Third-Party Claims which may be asserted, to arbitration in accordance with the Constitution, By-Laws, Rules, Regulations and/or Code of Arbitration Procedure of the sponsoring organization.

2. The undersigned party hereby states that it has read the procedures and rules of the sponsoring organization relating to arbitration.

3. The undersigned party agrees that in the event a hearing is necessary, such hearing shall be held at a time and place as may be designated by the Director of Arbitration or the arbitrator(s). The undersigned party further agrees and understands that the arbitration will be conducted in accordance with the Constitution, By-Laws, Rules, Regulations and/or Code of Arbitration Procedure of the sponsoring organization.

4. The undersigned party further agrees to abide by and perform any award(s) rendered pursuant to this Submission Agreement and further agrees that a judgment and any interest due thereon, may be entered upon such award(s) and, for these purposes, the undersigned party hereby voluntarily consents to submit to the jurisdiction of any court of competent jurisdiction which may properly enter such judgment.

5. IN WITNESS WHEREOF, the party hereto has signed and acknowledged the foregoing Submission Agreement.

Claimant Signature
UBS Financial Services Inc.

By: Valerie Fasolo
Director

FOR PARTIES WHO ARE CORPORATION

STATE OF NEW JERSEY )
) ss.:
COUNTY OF HUDSON )

On the 4th day of October, 2007, before me personally appeared Valerie Fasolo to me known, who first being duly sworn by me, did depose and say that she is a Director of UBS Financial Services Inc., the corporation described in and which executed the foregoing instrument; that she has full and complete authority to file and execute the said instrument and all papers contained here, in the name of and on behalf of the said corporation; that she knows the seal of said entity; that was so affixed by order of the Board of Directors of the said corporation; and that she signed her name thereto by like order.

Notary Public

ELINES VLACHOS
ID # 2223454
NOTARY PUBLIC OF NEW JERSEY
Commission Expires 8/12/2009

ELINES VLACHOS NOTARY PUBLIC NEW JERSEY

## I. PARTIES

CLAIMANT(S): (Provide this information even if you are represented by counsel.)

UBS Financial Services Inc.

Name

725 S. Figueroa Street - Suite 4100

Address

| | | |
|---|---|---|
| Los Angeles | California | 90017 |
| City | State | Zip Code |
| 213-253-5334 | 213-253-5469 | Amy.melner@ubs.com |
| Daytime Telephone | Fax # | Email Address |

Residence during the time of the dispute (if different from above):

Name

Address

City State Zip Code

Claimant is a:

☐ Public customer ☒ Broker-dealer ☐ Person associated with a broker-dealer

BD # CRD #

**Claimant's Counsel/Representative (if applicable):** (Note: FINRA requires that persons representing Florida investors in arbitration proceedings conducted in or outside of the State of Florida affirm either that they are licensed to practice law and provide a bar identification number, or that they are not receiving compensation in connection with representing the party in the arbitration proceeding.)

| | | |
|---|---|---|
| Amy Melner, Esq. | CA Bar #198841 | |
| Name | Bar ID # (if applicable) | |
| 725 S. Figueroa Street - Suite 4100 | | |
| Address | | |
| Los Angeles | California | 90017 |
| City | State | Zip Code |
| 213-253-5334 | 213-253-5469 | Amy.melner@ubs.com |
| Business Telephone | Fax # | Email Address |

**If needed, copy this page to list additional accounts.**

**RESPONDENT(S)**

**Respondent #1:**

Gail Struthers

Name

3546 Mount Everest Boulevard

Address

San Diego | California | 92111

City | State | Zip Code

Business Telephone | Fax | Email Address

Respondent #1 is a:

☐ Public customer ☐ Broker-dealer ☒ Person associated with a broker-dealer

BD # CRD #

**Respondent #2:**

Name

Address

City | State | Zip Code

Business Telephone | Fax # | Email Address

Respondent #2 is a :

☐ Public customer ☐ Broker-dealer ☐ Person associated with a broker-dealer

BD # CRD #

**If needed, copy this page to list additional accounts.**

---

## II. CLAIMS

**Accounts:** If the dispute or claim involves activity with respect to an account or accounts, please list each account and indicate the type of account it is (*e.g.*, joint account, custodial account, etc.)

**1.**

| | |
|---|---|
| Name (exactly as it appears on the account) | Type of Account |
| Name of Firm and Branch Office | Date Account Opened |
| Name of Registered Representative | Account Number |

**2.**

| | |
|---|---|
| Name (exactly as it appears on the account) | Type of Account |
| Name of Firm and Branch Office | Date Account Opened |
| Name of Registered Representative | Account Number |

**3.**

| | |
|---|---|
| Name (exactly as it appears on the account) | Type of Account |
| Name of Firm and Branch Office | Date Account Opened |
| Name of Registered Representative | Account Number |

**If needed, copy this page to list additional accounts.**

---

## III. RELIEF REQUESTED

### 1. Damages

**Actual Damages Requested** $ 326,696.44 1.
(monetary sum required to compensate a party for his or her loss excluding interests and expenses)

**Punitive Damages Requested** N/A 2.
(monetary amount intended to punish the wrongdoer)

* AMOUNT IN DISPUTE: 326,696.44 3.

* Use this amount to calculate the correct filing fee and hearing session deposit in Part IV. This amount *must* match the amount stated in your claim.

Interest To Be Provided.
(include calculations, if possible)

### 2. Other Type of Relief Requested

Specific Performance (Specify the type of specific performance sought)
(specific performance requires parties to take an action, such as turning over ownership of stocks)

---

Injunctive Relief (Specify the type of injunctive relief sought)
(injunctions require parties to refrain from certain actions)

---

### 3. Costs

(Provide specific amounts, if known. If not known, please mark an "X" to indicate the costs you are requesting)

XX
Forum Fees

XX
Attorney's Fees

Witness and Production Fees

XX
Other Case-Related Costs

Type of Dispute: (Check where applicable)

**a. Account Related**

| | | | | | |
|---|---|---|---|---|---|
| | Breach of Contract | | Collection | | Dividends |
| | Errors/Charges | | Exchanges | | Failure to Supervise |
| | Margin Calls | | Negligence | | Transfer |
| | Other | | | | |

**b. Executions**

| | | | | | |
|---|---|---|---|---|---|
| | Execution Price | | Failure to Execute | | Incorrect Quantity |
| | Limit Versus Market Order | | Other | | |

**c. Account Activity**

| | | | | | |
|---|---|---|---|---|---|
| | Breach of Fiduciary Duty | | Churning | | Manipulations |
| | Misrepresentations/Non-Disclosures | | Omission of Facts | | Suitability |
| | Unauthorized Trading | | Other | | |

**d. Employment**

| | | | | | |
|---|---|---|---|---|---|
| X | Breach of Contract | | Commissions | | Compensation |
| | Discrimination Age | | Discrimination Disability | | Discrimination Gender |
| | Discrimination National Origin | | Discrimination Race | | Discrimination Religion |
| | Discrimination Sexual Preference | | Partnerships | X | Promissory Notes |
| | Sexual Harassment | | Training Contracts | | Wrongful Termination |
| | Other | | Libel or Slander on Form U-5 | | Libel or Slander |

**e. Trading Dispute**

| | | | | | |
|---|---|---|---|---|---|
| | Buy-In | | D.K.s | | Manipulation |
| | Markups | | Sell Outs | | Stock Loan |
| | Transfers | | Others | | |

**f. Other**

| | | | | | |
|---|---|---|---|---|---|
| | Clearing Dispute | | Defamation | | Indemnification |
| | Raiding Disputes | | Underwriting | | Other |

**Type of Security(ies), Financial Instrument(s), and/or Investment(s) involved in the Dispute:**

| | | | | | |
|---|---|---|---|---|---|
| | Annuities | | Certificates of Deposit | | Commodities Futures |
| | Common Stock | | Corporate Bonds | | "Fannie Maes" |
| | "Freddie Macs" | | "Ginnie Maes" | | Government Securities |
| | Hedge Funds | | Limited Partnerships | | Mutual Funds |
| | Municipal Bonds | | Municipal Bond Funds | | Options |
| | Other Types of Securities | | Preferred Stock | | Repurchase Agreements |
| | Real Estate Investment Trust | | Reverse Repurchase Agreements | | Stock Index Futures |
| | Warrants/Rights | | | | |

FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC.

| | |
|---|---|
| UBS FINANCIAL SERVICES INC.,<br>Claimant,<br>– against –<br>GAIL STRUTHERS,<br>Respondent. | FINRA No.<br><br>**UNIFORM SUBMISSION AGREEMENT** |

1. The undersigned party hereby submits the present matter in controversy, as set forth in the attached Statement of Claim, Answers and all related Counterclaims and/or Third-Party Claims which may be asserted, to arbitration in accordance with the Constitution, By-Laws, Rules, Regulations and/or Code of Arbitration Procedure of the sponsoring organization.

2. The undersigned party hereby states that it has read the procedures and rules of the sponsoring organization relating to arbitration.

3. The undersigned party agrees that in the event a hearing is necessary, such hearing shall be held at a time and place as may be designated by the Director of Arbitration or the arbitrator(s). The undersigned party further agrees and understands that the arbitration will be conducted in accordance with the Constitution, By-Laws, Rules, Regulations and/or Code of Arbitration Procedure of the sponsoring organization.

4. The undersigned party further agrees to abide by and perform any award(s) rendered pursuant to this Submission Agreement and further agrees that a judgment and any interest due thereon, may be entered upon such award(s) and, for these purposes, the undersigned party hereby voluntarily consents to submit to the jurisdiction of any court of competent jurisdiction which may properly enter such judgment.

5. IN WITNESS WHEREOF, the party hereto has signed and acknowledged the foregoing Submission Agreement.

Claimant Signature
UBS Financial Services Inc.

By: Valerie Fasolo
Director

FOR PARTIES WHO ARE CORPORATION

STATE OF NEW JERSEY )
) ss.:
COUNTY OF HUDSON )

On the 4th day of October, 2007, before me personally appeared Valerie Fasolo to me known, who first being duly sworn by me, did depose and say that she is a Director of UBS Financial Services Inc., the corporation described in and which executed the foregoing instrument; that she has full and complete authority to file and execute the said instrument and all papers contained here, in the name of and on behalf of the said corporation; that she knows the seal of said entity; that was so affixed by order of the Board of Directors of the said corporation; and that she signed her name thereto by like order.

Notary Public

ELINES VLACHOS
ID # 2223454
NOTARY PUBLIC OF NEW JERSEY
Commission Expires 8/12/2009

ELINES VLACHOS NOTARY PUBLIC NEW JERSEY

## I. PARTIES

CLAIMANT(S): (Provide this information even if you are represented by counsel.)

UBS Financial Services Inc.

Name

725 S. Figueroa Street - Suite 4100

Address

| Los Angeles | California | 90017 |
|---|---|---|
| City | State | Zip Code |
| 213-253-5334 | 213-253-5469 | Amy.melner@ubs.com |
| Daytime Telephone | Fax # | Email Address |

Residence during the time of the dispute (if different from above):

Name

Address

City State Zip Code

Claimant is a:

☐ Public customer ☒ Broker-dealer ☐ Person associated with a broker-dealer

BD # CRD #

**Claimant's Counsel/Representative (if applicable):** (Note: FINRA requires that persons representing Florida investors in arbitration proceedings conducted in or outside of the State of Florida affirm either that they are licensed to practice law and provide a bar identification number, or that they are not receiving compensation in connection with representing the party in the arbitration proceeding.)

| Amy Melner, Esq. | CA Bar #198841 |
|---|---|
| Name | Bar ID # (if applicable) |

725 S. Figueroa Street - Suite 4100

Address

| Los Angeles | California | 90017 |
|---|---|---|
| City | State | Zip Code |
| 213-253-5334 | 213-253-5469 | Amy.melner@ubs.com |
| Business Telephone | Fax # | Email Address |

**If needed, copy this page to list additional accounts.**

**RESPONDENT(S)**

**Respondent #1:**

Gail Struthers
Name

3546 Mount Everest Boulevard
Address

San Diego | California | 92111
City | State | Zip Code

Business Telephone | Fax | Email Address

Respondent #1 is a:

☐ Public customer ☐ Broker-dealer ☒ Person associated with a broker-dealer

BD # CRD #

**Respondent #2:**

Name

Address

City | State | Zip Code

Business Telephone | Fax # | Email Address

Respondent #2 is a :

☐ Public customer ☐ Broker-dealer ☐ Person associated with a broker-dealer

BD # CRD #

**If needed, copy this page to list additional accounts.**

---

## II. CLAIMS

**Accounts:** If the dispute or claim involves activity with respect to an account or accounts, please list each account and indicate the type of account it is (*e.g.*, joint account, custodial account, etc.)

**1.**

| | |
|---|---|
| Name (exactly as it appears on the account) | Type of Account |
| Name of Firm and Branch Office | Date Account Opened |
| Name of Registered Representative | Account Number |

**2.**

| | |
|---|---|
| Name (exactly as it appears on the account) | Type of Account |
| Name of Firm and Branch Office | Date Account Opened |
| Name of Registered Representative | Account Number |

**3.**

| | |
|---|---|
| Name (exactly as it appears on the account) | Type of Account |
| Name of Firm and Branch Office | Date Account Opened |
| Name of Registered Representative | Account Number |

**If needed, copy this page to list additional accounts.**

## III. RELIEF REQUESTED

### 1. Damages

Actual Damages **Requested** $ 326,696.44 1.
(monetary sum required to compensate a party for his or her loss excluding interests and expenses)

Punitive Damages **Requested** N/A 2.
(monetary amount intended to punish the wrongdoer)

* AMOUNT IN DISPUTE: 326,696.44 3.

* Use this amount to calculate the correct filing fee and hearing session deposit in Part IV. This amount *must* match the amount stated in your claim.

Interest
(include calculations, if possible) To Be Provided.

### 2. Other Type of Relief Requested

Specific Performance (Specify the type of specific performance sought)
(specific performance requires parties to take an action, such as turning over ownership of stocks)

Injunctive Relief (Specify the type of injunctive relief sought)
(injunctions require parties to refrain from certain actions)

### 3. Costs

(Provide specific amounts, if known. If not known, please mark an "X" to indicate the costs you are requesting)

XX
Forum Fees

XX
Attorney's Fees

Witness and Production Fees

XX
Other Case-Related Costs

Type of Dispute: (Check where applicable)

**a. Account Related**

| | | | | | |
|---|---|---|---|---|---|
| | Breach of Contract | | Collection | | Dividends |
| | Errors/Charges | | Exchanges | | Failure to Supervise |
| | Margin Calls | | Negligence | | Transfer |
| | Other | | | | |

**b. Executions**

| | | | | | |
|---|---|---|---|---|---|
| | Execution Price | | Failure to Execute | | Incorrect Quantity |
| | Limit Versus Market Order | | Other | | |

**c. Account Activity**

| | | | | | |
|---|---|---|---|---|---|
| | Breach of Fiduciary Duty | | Churning | | Manipulations |
| | Misrepresentations/Non-Disclosures | | Omission of Facts | | Suitability |
| | Unauthorized Trading | | Other | | |

**d. Employment**

| | | | | | |
|---|---|---|---|---|---|
| X | Breach of Contract | | Commissions | | Compensation |
| | Discrimination Age | | Discrimination Disability | | Discrimination Gender |
| | Discrimination National Origin | | Discrimination Race | | Discrimination Religion |
| | Discrimination Sexual Preference | | Partnerships | X | Promissory Notes |
| | Sexual Harassment | | Training Contracts | | Wrongful Termination |
| | Other | | Libel or Slander on Form U-5 | | Libel or Slander |

**e. Trading Dispute**

| | | | | | |
|---|---|---|---|---|---|
| | Buy-In | | D.K.s | | Manipulation |
| | Markups | | Sell Outs | | Stock Loan |
| | Transfers | | Others | | |

**f. Other**

| | | | | | |
|---|---|---|---|---|---|
| | Clearing Dispute | | Defamation | | Indemnification |
| | Raiding Disputes | | Underwriting | | Other |

**Type of Security(ies), Financial Instrument(s), and/or Investment(s) involved in the Dispute:**

| | | | | | |
|---|---|---|---|---|---|
| | Annuities | | Certificates of Deposit | | Commodities Futures |
| | Common Stock | | Corporate Bonds | | "Fannie Maes" |
| | "Freddie Macs" | | "Ginnie Maes" | | Government Securities |
| | Hedge Funds | | Limited Partnerships | | Mutual Funds |
| | Municipal Bonds | | Municipal Bond Funds | | Options |
| | Other Types of Securities | | Preferred Stock | | Repurchase Agreements |
| | Real Estate Investment Trust | | Reverse Repurchase Agreements | | Stock Index Futures |
| | Warrants/Rights | | | | |

*Gail Struthers v. UBS Financial Services, Inc.*
United States District Court - CASE NO. 08cv1381 H (JMA)

Judge Marilyn L. Huff

Courtroom 13

**DEFENDANT UBS FINANCIAL SERVICES INC.'S NOTICE OF MOTION AND MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATIONS OF JENNIFER NIES AND STEPHEN D. BIRD IN SUPPORT OF THEREOF**

# EXHIBIT "5"

January 30, 2008

VIA Facsimile

Finra
300 South Grand Avenue
Suite 900
Los Angeles, CA 90071

RE: FINRA Dispute Resolution Arbitration Number 07-02862
UBS Financial Services Inc. v. Gail Struthers

Dear Mr. Sorrells,

It is my understanding, per our telephone conversation last week, that you will be the representative facilitating the arbitration case brought forward by UBS Financial Services Inc. You suggested that I respond to the suit prior to the initial phone call scheduled for January 31st at 10:00am and make a statement of answer. Although I have yet to speak to an attorney regarding this matter, which I fully intend on doing, I will go ahead and make a brief statement of answer.

My statement is simply this; UBS Financial Services Inc. has disproven their need for this case with their own statement of claim which they filed through Amy Melner, Esq. dated October 4, 2007. In the claim on page 3 point number 10 it states, "The Note further provided that in the event that Struthers employment with UBSFS is terminated, either voluntarily or involuntarily by Struthers or UBSFS, for any reason whatsoever other than disability or death," this clearly nullifies their suit based on the simple fact that I was at the point of termination and still am disabled. UBS was made aware of this fact in some very detailed correspondence exchanged in May of 2007. Unfortunately, for myself, I have been declared disabled by four different physicians in the past 13 months.

There are many other factors in this case that do not apply at this time but will be brought to light after I have had a chance to consult with an attorney. The simple fact is that I am disabled and remain disabled and unable to work even now. UBS was made aware of this disability and decided to terminate my employment regardless of that fact.

Before continuing any further, I respectfully request that I be allowed to consult with my physicians and an attorney before I respond any further in this case. I will forward a copy of this letter to Ms. Melner, UBS' counsel.

Best regards,

Gail A Struthers

*Gail Struthers v. UBS Financial Services, Inc.*
United States District Court - CASE NO. 08cv1381 H (JMA)

Judge Marilyn L. Huff

Courtroom 13

**DEFENDANT UBS FINANCIAL SERVICES INC.'S NOTICE OF MOTION AND MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATIONS OF JENNIFER NIES AND STEPHEN D. BIRD IN SUPPORT OF THEREOF**

# EXHIBIT "6"

DAVID E. ROSENBAUM, ESQ. 49735
484 South Euclid Avenue, Suite 105
Pasadena, California 91101
Tel: (626) 432-7422 FAX: (626) 792-5433

Attorney for Defendant GAIL STRUTHERS

**FINANCIAL INDUSTRY REGULATORY AGENCY**

**LOS ANGELES, CALIFORNIA**

| | |
|---|---|
| UBS FINANCIAL SERVICES, INC.,<br>Plaintiff,<br>vs.<br>GAIL STRUTHERS,<br>Defendant. | Case No. 07-02862<br><br>**NOTICE OF APPEARANCE FOR GAIL STRUTHERS**<br><br>**DATE:** MARCH 3, 2008<br>**TIME:** 10:00 A.M. |

To FINANCIAL INDUSTRY REGULATORY AGENCY, UBS FINANCIAL SERVICES, INC., plaintiff, and to the attorneys of record for UBS FINANCIAL:

NOTICE IS HEREBY GIVEN that I have been retained by, and hereby appear for, Defendant GAIL STRUTHERS in this proceeding, including the conference call scheduled for March 3, 2008 at 10:00 a.m. PST. Please note that my contact information is as follows:

DAVID E. ROSENBAUM, ESQ. 49735
484 South Euclid Avenue, Suite 105
Pasadena, California 91101
Tel: (626) 432-7422 FAX: (626) 792-5433
Email: davider484@sbcglobal.net

DATED: February 29, 2008

David E. Rosenbaum

DAVID E. ROSENBAUM
Attorney for GAIL STRUTHERS

## PROOF OF SERVICE

STATE OF CALIFORNIA )
) ss.
COUNTY OF LOS ANGELES )

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 484 So. Euclid Avenue, Suite 105, Pasadena, California 91101.

On February 29, 2008, I served the foregoing document described as:

**NOTICE OF APPEARANCE FOR GAIL STRUTHERS**

on the interested parties by transmitting a true copy thereof to the following individuals at the below-listed facsimile numbers:

Amy Melner, Esq.
UBS Financial Services, Inc.
725 So. Figueroa St.
Suite 4100
Los Angeles, CA 90017
FAX: 213-253-5469

Stephen D. Bird, Esq.
1200 Harbor Blvd.
Weehawken, NJ 07086
FAX: 201-352-7291

No errors were reported during said transmissions.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct

Executed on February 29, 2008, at Pasadena, California.

David E. Rosenbaum

DAVID E. ROSENBAUM

*Gail Struthers v. UBS Financial Services, Inc.*
United States District Court - CASE NO. 08cv1381 H (JMA)

Judge Marilyn L. Huff

Courtroom 13

**DEFENDANT UBS FINANCIAL SERVICES INC.'S NOTICE OF MOTION AND MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATIONS OF JENNIFER NIES AND STEPHEN D. BIRD IN SUPPORT OF THEREOF**

# EXHIBIT "7"

03/06/2008 15:13 FAX 6267925433

COPY

FILED
CIVIL BUSINESS OFFICE
CENTRAL DIVISION

08 MAR -6 PM 4:06

CLERK-SUPERIOR COURT
SAN DIEGO COUNTY, CA

David E. Rosenbaum STATE BAR NO. 49735
484 So. Euclid Avenue, Suite 105
Pasadena, California 91101
Telephone: (626) 432-7422
FAX: (626) 792-5433

Attorney for Plaintiff
GAIL STRUTHERS

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO, CENTRAL [HALL OF JUSTICE] DIVISION

GAIL STRUTHERS, an individual,

Plaintiff,

vs.

UBS FINANCIAL SERVICES, INC., a corporation; and DOES 1 through 10, inclusive,

Defendants.

Case No. 37-2008-00079382-CU-BT-CTL

COMPLAINT FOR:

(1) INTENTIONAL MISREPRESENTATION
(2) NEGLIGENT MISREPRESENTATION
(2) VIOLATION OF PLAINTIFF'S RIGHTS UNDER THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING LAW
(3) INVASION OF PRIVACY
(2) INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS
(5) BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

BY FAX

Plaintiff, for her Complaint alleges:

GENERAL ALLEGATIONS

1. Plaintiff, GAIL STRUTHERS, is an individual who resides and has at certain times relevant hereto resided in the State of California, County of San Diego, and City of San Diego.

2. Defendant, UBS FINANCIAL SERVICES, INC. ("UBS," not in italics), is and at all times relevant herein was, a corporation organized under the laws of the State of Delaware, which does business in the State of California and has a principal place of

David E. Rosenbaum STATE BAR NO. 49735
484 So. Euclid Avenue, Suite 105
Pasadena, California 91101
Telephone: (626) 432-7422
FAX: (626) 792-5433

Attorney for Plaintiff
GAIL STRUTHERS

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**COUNTY OF SAN DIEGO, CENTRAL [HALL OF JUSTICE] DIVISION**

| | |
|---|---|
| GAIL STRUTHERS, an individual,<br><br>Plaintiff,<br>vs.<br><br>UBS FINANCIAL SERVICES, INC., a corporation; and DOES 1 through 10, inclusive,<br><br>Defendants. | Case No.<br><br>**COMPLAINT FOR:**<br>**(1) INTENTIONAL MISREPRESENTATION**<br>**(2) NEGLIGENT MISREPRESENTATION**<br>**(2) VIOLATION OF PLAINTIFF'S RIGHTS UNDER THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING LAW**<br>**(3) INVASION OF PRIVACY**<br>**(2) INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS**<br>**(5) BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING** |

Plaintiff, for her Complaint alleges:

**GENERAL ALLEGATIONS**

1. Plaintiff, GAIL STRUTHERS, is an individual who resides and has at certain times relevant hereto resided in the State of California, County of San Diego, and City of San Diego.

2. Defendant, UBS FINANCIAL SERVICES, INC. ("UBS," not in italics), is and at all times relevant herein was, a corporation organized under the laws of the State of Delaware, which does business in the State of California and has a principal place of

business in the County of San Diego.

3. Plaintiff does not know the true names and capacities, whether individual, corporate, partnership or otherwise, of each of the Defendants designated herein as DOES 1 through 10 at this time and sue said defendants herein under fictitious names. Each of them is a resident of and/or transacts business in the State of California. Plaintiff will ask leave of court for permission to amend this complaint to show the true names and capacities of said DOES when ascertained. Plaintiff is informed and believes and thereon alleges that each of the fictitiously named Defendants is indebted to Plaintiff as hereinafter alleged, and that Plaintiff's rights against such fictitiously named DOE Defendants arise from such indebtedness. Whenever reference is made herein to named Defendant UBS, said reference shall include these fictitiously named Doe Defendants.

4. With respect to each allegation contained herein that is alleged on plaintiff's information and belief, said allegations are likely to have evidentiary support after Plaintiff is given a reasonable opportunity for further investigation and discovery.

5. Plaintiff is informed and believes and on that basis alleges that each of Defendants DOES 1 through 10 was the agent, partner, servant and/or employee of each of the other Defendants, and acted or failed to act as herein alleged in the course and scope of said agency, authority, partnership, and/or employment.

**FIRST CAUSE OF ACTION**

**(Intentional Misrepresentation)**

**(As Against All Defendants)**

6. Plaintiff incorporates herein by this reference paragraphs 1 through 5, above, and re-alleges them as if fully set forth herein.

7. Before March 7, 2006, plaintiff was a securities broker employed at Morgan Stanley, with $55 million in assets under management. Plaintiff was generating approximately $500,000 per year in revenue, from which her take-home compensation was over $300,000 per year, plus benefits and pension & 401-K contributions. She was

the No. 1 revenue-producing broker for her years of experience in Morgan Stanley, and, in that capacity, spoke at Morgan Stanley's annual national conference in 2005.

8. To induce plaintiff to resign from Morgan Stanley and become employed by UBS, Defendant UBS made numerous material representations. UBS intended that plaintiff would rely on said representations and would resign from her employment with Morgan Stanley and become employed by UBS.

9. Plaintiff justifiably relied on UBS's said material representations and, as a result, resigned from her employment with Morgan Stanley and became employed by UBS.

10. Unknown to plaintiff, said representations were false and UBS knew them to be false when the representations were made.

11. In the alternative, said representations were false and UBS knew or by the exercise of reasonable care should have known that it did not know whether said representations were true or false.

12. When UBS made certain of said representations to plaintiff, UBS was duty bound to speak the whole truth known to it concerning such matters, for where one speaks as to a specific subject, he must speak the whole truth in making such representation to the end that he does not conceal any facts which materially qualify those stated, for one who is asked for information must be truthful, and the telling of a half-truth calculated to deceive is fraud.

13. In the alternative, when UBS made such representations to plaintiff, UBS was duty bound to speak the whole truth known to it concerning such matters in that UBS had exclusive knowledge of material facts not known to plaintiff and UBS knew that these material facts were unknown to, or were beyond the reach of, plaintiff.

14. In the alternative, when Defendants made such representations to plaintiff, UBS was duty bound to speak the whole truth known to it concerning such matters in that UBS as prospective employer had a fiduciary or quasi-fiduciary duty of disclosure to a prospective employee under the circumstances alleged herein.

15. Had plaintiff known that said representations were false, she would not have resigned from her employment with Morgan Stanley and would not have agreed to be employed by UBS.

16. As a proximate result of the foregoing, plaintiff has suffered damages in an amount to be proven at trial.

17. Based on the foregoing, UBS's aforementioned conduct constituted willful and intentional misrepresentations, deceit, or concealment of material facts known to Defendants within the meaning of Civil Code § 1572. UBS engaged in said conduct in conscious disregard of plaintiff's rights, and in violation of Civil Code §§1709 and 3343. Accordingly, Defendant's conduct justifies an award of exemplary and punitive damages.

**SECOND CAUSE OF ACTION**

**(Negligent Misrepresentation)**

**(As Against All Defendants)**

18. Plaintiff incorporates herein by this reference paragraphs 1 through 5 and 7 through 16 above, and re-alleges them as if fully set forth herein.

19. When UBS made the said representations, it had no reasonable grounds for believing them to be true.

**THIRD CAUSE OF ACTION**

**(For Violation of Plaintiff's Rights Under the California Fair Employment and Housing Law)**

**(As Against All Defendants)**

20. Plaintiff incorporates herein by this reference paragraphs 1 through 5 and 7 above, and re-alleges them as if fully set forth herein.

21. During plaintiff's employment at Morgan Stanley, she became acquainted with Mr. Toby Ferner (herein, "Ferner"), another broker employed by Morgan Stanley.

22. Ferner left the employment of Morgan Stanley to become the manager of UBS's Carlsbad, California office. At all times mentioned herein, Ferner was Vice

President and Branch Manager of UBS's Carlsbad, California office.

23. In 2006, Ferner approached plaintiff with a proposal that she move from Morgan Stanley to UBS.

24. At all times during her career with Morgan Stanley, plaintiff had and still has a mental disability, commonly known as 'bi-polar disorder.' That disability is controllable with medication that plaintiff takes and posed no difficulty at Morgan Stanley, where plaintiff was permitted to work from her home when necessary either because of the bi-polar disorder or because plaintiff has children that she must care for.

25. Before becoming employed by UBS, plaintiff informed Ferner of the bi-polar disorder and of her occasional need to work from home due to it and due to her children. Plaintiff further informed Ferner that, for these reasons, plaintiff would occasionally need to work and place customers' orders from her home. In the course of dealings that led to her employment with UBS, Ferner represented that UBS would accommodate plaintiff's said need to work and place customers' orders from her home.

26. On or about March 7, 2006, the plaintiff commenced employment with UBS as a financial advisor in its Carlsbad, California office.

27. Approximately simultaneous with plaintiff's commencement of employment, UBS also hired a financial advisor whose first name is Mike, but whose full name and location are currently unknown to plaintiff.

28. In or about the spring and early summer of 2006, Mike engaged a course of sexual harassment of plaintiff and other female employees in UBS's Carlsbad, California office. Mike engaged in said harassment with the actual and constructive knowledge and consent of Defendant UBS.

29. Mike's sexual harassment of the plaintiff consisted of sexual advances and demands, sexual assault, and sexually degrading remarks to plaintiff. Mike engaged in similar conduct with respect to other women in UBS's Carlsbad, California office.

30. Within approximately one month after being hired, plaintiff began complaining to Ferner about the above sexual harassment of plaintiff and other female employees in

UBS's Carlsbad, California office. Ferner took no action with respect to Mike's sexual harassment and, when plaintiff complained that Mike sexually assaulted her, Ferber stated that plaintiff could "take it" or could "take care of [herself]" or words to that effect.

31. In retaliation for plaintiff's complaints about Mike's sexual harassment, Ferner on behalf of UBS took numerous actions against plaintiff which eventually resulted in an environment in the Carlsbad office that was so hostile to plaintiff that plaintiff was unable to continue working in that office. These included, but are not limited to the following: Ferner violated plaintiff's medical privacy, both within the office and outside. Disclosures concerning plaintiff's medical condition were made to plaintiff's Sales Assistant. In addition, UBS disclosed a series of adverse communications about plaintiff's personnel status to her Sales Assistant who then sent them to plaintiff. The said violations of privacy as to plaintiff's Sales Assistant not only made it impossible for plaintiff to work with the Sales Assistant, but also subjected plaintiff to humiliation and ridicule, and caused plaintiff to become a virtual pariah among the staff that plaintiff depended on. In addition, Ferner made defamatory statements about plaintiff to people in other securities firms, and to at least one of plaintiff's customers. On information and belief, plaintiff further alleges that Ferner made defamatory innuendos about her to others. When plaintiff asked that Ferner honor the agreement that UBS would accommodate her need to work and place orders from her home Ferner refused. This refusal continued even after plaintiff's doctor sent UBS a letter in September 2006 stating that due to plaintiff's medical disability and the environment in the Carlsbad office, she needed to work from home. Another example of the retaliation was that Ferner began dealing directly with plaintiff's customers and attempted to persuade them to switch their accounts to Ferner or to other brokers in the office.

32. As a result of the foregoing and other wrongful conduct by Ferner and UBS, plaintiff entered treatment and continues to be treated for mental disability due to the foregoing events. On or about October 31, 2006, plaintiff wrote to Ferner (i) describing the foregoing and other intolerable working conditions and UBS's numerous breaches

of agreements, (ii) informing him that these matters had caused plaintiff to suffer mental disability and (iii) that plaintiff's physician had advised that she was not to return to work under the existing working conditions. Despite the October 31, 2006 letter and Ferner's knowledge that the medical disability prevented plaintiff from reporting for work in his office, Ferner continued to retaliate against plaintiff by repeatedly insisting that she report to work by certain specific dates. This continued even after plaintiff's physician submitted a letter from my doctor advising that plaintiff was disabled and unable to report for work.

33. Ultimately, plaintiff was placed on leave status and continued in that status from January 2007 through mid-May 2007. UBS provided plaintiff no documentation as to the leave status or its length or expiration date. There was no communication between plaintiff and UBS during the period of January 2007 through mid-May 2007.

34. From January 2007 through May 2007 and thereafter continuing to this date, plaintiff has been under treatment for mental disability by her physician and mental health professionals, including psychiatrists. Plaintiff's mental disability increased in severity to the point that she was hospitalized from May 11 through May 17, 2007.

35. During that hospitalization, UBS on May 14, 2007, wrote to plaintiff stating that her medical leave had expired on May 1, 2007, that she was required to report for work in Ferner's office on that date, that she failed to report, and that, as a result, she was being discharged from UBS's employment, effective May 15, 2007.

36. On May 25, 2007, UBS made written demand that plaintiff repay a promissory note that was supposed to be forgiven if UBS discharged plaintiff due to disability.

37. UBS, by its aforesaid conduct, has violated plaintiff's rights under the California Fair Employment and Housing Act.

38. As a direct and proximate result of UBS's conduct, plaintiff has suffered damage in an amount to be proved at trial.

39. Plaintiff has filed charges of discrimination with the California Department of Fair Employment and Housing and has received a right to sue letter, a copy of which is

attached hereto as Exhibit 1.

**FOURTH CAUSE OF ACTION**

**(Invasion of Privacy)**

**(As Against All Defendants)**

40. Plaintiff incorporates herein by this reference paragraphs 1 through 5, 7 and 21 through 36 above, and re-alleges them as if fully set forth herein.

41. UBS's disclosures of private information concerning plaintiff's medical disability and personnel matters violated plaintiff's privacy.

42. The disclosure by defendant was a public disclosure.

43. The facts disclosed about plaintiff were private facts that plaintiff desired to keep private.

44. The disclosure by defendant of the above facts was offensive and objectionable to plaintiff and to a reasonable person of ordinary sensibilities.

45. The private facts disclosed by defendant were not of legitimate public concern, or newsworthy.

46. As a proximate result of the above disclosure, plaintiff was scorned and abandoned by her business associates, exposed to contempt and ridicule, and suffered loss of reputation and standing in the community, all of which caused her general damage in an amount according to proof.

47. As a further proximate result of the above-mentioned disclosure, plaintiff has suffered injury to her business and employment in an amount according to proof.

48. In making said disclosures, UBS was guilty of oppression and malice. UBS engaged in said conduct in conscious disregard of plaintiff's rights, and in violation of Civil Code §§1709 and 3343. Plaintiff therefore seeks an award of exemplary damages.

**FIFTH CAUSE OF ACTION**

**(Intentional Infliction of Emotional Distress)**

**(As Against All Defendants)**

49. Plaintiff incorporates herein by this reference paragraphs 1 through 5, 7, 21 through 36, and 41 through 47 above, and re-alleges them as if fully set forth herein.

50. The actions of UBS were outrageous and intentional and done with malice and reckless disregard of the likelihood of causing the plaintiff to suffer severe emotional distress.

51. As a proximate result of the aforementioned outrageous acts of UBS, plaintiff has suffered emotional damage. Additionally, as a proximate result of UBS's aforementioned outrageous acts, plaintiff has been unable to work and will be unable to work in her profession and occupation.

52. As a proximate result of the aforementioned outrageous acts of the defendant(s), plaintiff has suffered general and special damages in the sums to be proved at trial.

53. In doing the acts herein alleged, UBS acted knowingly, intentionally, and maliciously. UBS engaged in said conduct in conscious disregard of plaintiff's rights, and in violation of Civil Code §§1709 and 3343. Plaintiff therefore seeks an award of exemplary damages.

**SIXTH CAUSE OF ACTION**

**(Breach of the Implied Covenant of Good Faith and Fair Dealing)**

**(As Against All Defendants)**

54. Plaintiff incorporates herein by this reference paragraphs 1 through 5, 7, 21 through 36, and 41 through 47 above, and re-alleges them as if fully set forth herein.

55. By its aforesaid conduct, UBS breached the implied covenant of good faith and fair dealing of its contract with plaintiff.

56. As a proximate result of the aforementioned conduct, plaintiff has suffered damages in an amount be proved at trial.

WHEREFORE, Plaintiff for judgment as follows:

1. For compensatory damages in an amount to be proven at trial;
2. With respect to the First, Third, Fourth and Fifth Causes of Action, for

punitive and exemplary damages according to proof;

3. With respect to all causes of action:

a. For pre-judgment interest as allowed by law;

b. For attorney fees and costs as authorized by law;

c. For costs of suit herein incurred; and

d. For such other and further relief as the court deems proper.

DATED: March 6, 2008

David E. Rosenbaum

DAVID E. ROSENBAUM
Attorney for Plaintiff GAIL STRUTHERS

# EXHIBIT 1

STATE OF CALIFORNIA - STATE AND CONSUMER SERVICES AGENCY ARNOLD SCHWARZENEGGER, Governor

**DEPARTMENT OF FAIR EMPLOYMENT & HOUSING**
1350 FRONT STREET, SUITE 3005, SAN DIEGO, CA, 92101
(619) 645-2681
www.dfeh.ca.gov

March 05, 2008

STRUTHERS, GAIL
3546 MT. EVEREST BLVD.
SAN DIEGO, CA 92111

RE: E200708D5077-00
STRUTHERS/UBS FINANCIAL SERVICES, INC.

Dear STRUTHERS, GAIL:

**NOTICE OF CASE CLOSURE**

This letter informs that the above-referenced complaint that was filed with the Department of Fair Employment and Housing (DFEH) has been closed effective March 05, 2008 because an immediate right-to-sue notice was requested. DFEH will take no further action on the complaint.

This letter is also the Right-To-Sue Notice. According to Government Code section 12965, subdivision (b), a civil action may be brought under the provisions of the Fair Employment and Housing Act against the person, employer, labor organization or employment agency named in the above-referenced complaint. The civil action must be filed within one year from the date of this letter.

If a federal notice of Right-To-Sue is wanted, the U.S. Equal Employment Opportunity Commission (EEOC) must be visited to file a complaint within 30 days of receipt of this DFEH *Notice of Case Closure* or within 300 days of the alleged discriminatory act, whichever is earlier.

DFEH does not retain case files beyond three years after a complaint is filed, unless the case is still open at the end of the three-year period.

Sincerely,

Belinda LeDoux

Belinda LeDoux
District Administrator

cc: Case File

JENNIFER NIES
ASSOCIATE DIRECTOR, CLIENT RELATIONSHIP MANAGER
UBS FINANCIAL SERVICES INC.
1000 HARBOR BLVD., 10TH FLOOR
WEEHAWKEN NJ 07086

DFEH-200-43 (06/06)

03/06/2008 15:34 FAX 6267925433 002/002

COPY

CM-010

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):
David E. Rosenbaum, Esq. S.B. 49735
484 So. Euclid Avenue, Suite 105
Pasadena, CA 91101
TELEPHONE NO.: 626-432-7422 FAX NO.: 626-792-5433
ATTORNEY FOR (Name):

FOR COURT USE ONLY

08 MAR -6 PM 4:06

CLERK-SUPERIOR COURT
SAN DIEGO COUNTY, CA

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO
STREET ADDRESS: 330 West Broadway
MAILING ADDRESS:
CITY AND ZIP CODE: San Diego, California 92101
BRANCH NAME: Central (Hall of Justice)

CASE NAME: GAIL STRUTHERS vs. UBS FINANCIAL SERVICES, INC.

**CIVIL CASE COVER SHEET**

[✓] Unlimited (Amount demanded exceeds $25,000) [ ] Limited (Amount demanded is $25,000 or less)

Complex Case Designation
[ ] Counter [ ] Joinder
Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402)

CASE NUMBER: 37-2008-00079382-CU-BT-CTL
JUDGE:
DEPT:

BY FAX

*Items 1–6 below must be completed (see instructions on page 2).*

1. Check one box below for the case type that best describes this case:

**Auto Tort**
- [ ] Auto (22)
- [ ] Uninsured motorist (46)

**Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort**
- [ ] Asbestos (04)
- [ ] Product liability (24)
- [ ] Medical malpractice (45)
- [ ] Other PI/PD/WD (23)

**Non-PI/PD/WD (Other) Tort**
- [✓] Business tort/unfair business practice (07)
- [ ] Civil rights (08)
- [ ] Defamation (13)
- [ ] Fraud (16)
- [ ] Intellectual property (19)
- [ ] Professional negligence (25)
- [ ] Other non-PI/PD/WD tort (35)

**Employment**
- [ ] Wrongful termination (36)
- [ ] Other employment (15)

**Contract**
- [ ] Breach of contract/warranty (06)
- [ ] Rule 3.740 collections (09)
- [ ] Other collections (09)
- [ ] Insurance coverage (18)
- [ ] Other contract (37)

**Real Property**
- [ ] Eminent domain/Inverse condemnation (14)
- [ ] Wrongful eviction (33)
- [ ] Other real property (26)

**Unlawful Detainer**
- [ ] Commercial (31)
- [ ] Residential (32)
- [ ] Drugs (38)

**Judicial Review**
- [ ] Asset forfeiture (05)
- [ ] Petition re: arbitration award (11)
- [ ] Writ of mandate (02)
- [ ] Other judicial review (39)

**Provisionally Complex Civil Litigation (Cal. Rules of Court, rules 3.400–3.403)**
- [ ] Antitrust/Trade regulation (03)
- [ ] Construction defect (10)
- [ ] Mass tort (40)
- [ ] Securities litigation (28)
- [ ] Environmental/Toxic tort (30)
- [ ] Insurance coverage claims arising from the above listed provisionally complex case types (41)

**Enforcement of Judgment**
- [ ] Enforcement of judgment (20)

**Miscellaneous Civil Complaint**
- [ ] RICO (27)
- [ ] Other complaint (*not specified above*) (42)

**Miscellaneous Civil Petition**
- [ ] Partnership and corporate governance (21)
- [ ] Other petition (*not specified above*) (43)

2. This case [ ] is [✓] is not complex under rule 3.400 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:
   a. [ ] Large number of separately represented parties
   b. [ ] Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve
   c. [ ] Substantial amount of documentary evidence
   d. [ ] Large number of witnesses
   e. [ ] Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court
   f. [ ] Substantial postjudgment judicial supervision
3. Remedies sought (*check all that apply*): a. [✓] monetary b. [ ] nonmonetary; declaratory or injunctive relief c. [✓] punitive
4. Number of causes of action (*specify*): SIX
5. This case [ ] is [✓] is not a class action suit.
6. If there are any known related cases, file and serve a notice of related case. (*You may use form CM-015.*)

Date: March 6, 2008
DAVID E. ROSENBAUM
(TYPE OR PRINT NAME)

(SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

NOTICE
- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 3.220.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 3.400 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.
- Unless this is a collections case under rule 3.740 or a complex case, this cover sheet will be used for statistical purposes only.

Page 1 of 2

Form Adopted for Mandatory Use
Judicial Council of California
CM-010 [Rev. July 1, 2007]

CIVIL CASE COVER SHEET

Cal. Rules of Court, rules 2.30, 3.220, 3.400–3.403, 3.740; Cal. Standards of Judicial Administration, std. 3.10
www.courtinfo.ca.gov

| | |
|---|---|
| **SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO**<br>STREET ADDRESS: 330 West Broadway<br>MAILING ADDRESS: 330 West Broadway<br>CITY AND ZIP CODE: San Diego, CA 92101<br>BRANCH NAME: Central<br>TELEPHONE NUMBER: (619) 685-6148 | |
| PLAINTIFF(S) / PETITIONER(S): Gail Struthers | |
| DEFENDANT(S) / RESPONDENT(S): UBS Financial Services Inc | |
| STRUTHERS VS. UBS FINANCIAL SERVICES INC | |
| **NOTICE OF CASE ASSIGNMENT** | CASE NUMBER:<br>37-2008-00079382-CU-BT-CTL |

Judge: Jeffrey B. Barton

Department: C-69

**COMPLAINT/PETITION FILED:** 03/06/2008

**CASES ASSIGNED TO THE PROBATE DIVISION ARE NOT REQUIRED TO COMPLY WITH THE CIVIL REQUIREMENTS LISTED BELOW.**

IT IS THE DUTY OF EACH PLAINTIFF (AND CROSS-COMPLAINANT) TO SERVE A COPY OF THIS NOTICE WITH THE COMPLAINT (AND CROSS-COMPLAINT).

ALL COUNSEL WILL BE EXPECTED TO BE FAMILIAR WITH SUPERIOR COURT RULES WHICH HAVE BEEN PUBLISHED AS DIVISION II, AND WILL BE STRICTLY ENFORCED.

**TIME STANDARDS:** The following timeframes apply to general civil cases and must be adhered to unless you have requested and been granted an extension of time. General civil consists of all cases except: Small claims appeals, petitions, and unlawful detainers.

**COMPLAINTS:** Complaints must be served on all named defendants, and a CERTIFICATE OF SERVICE (SDSC CIV-345) filed within 60 days of filing. This is a mandatory document and may not be substituted by the filing of any other document.

**DEFENDANT'S APPEARANCE:** Defendant must generally appear within 30 days of service of the complaint. (Plaintiff may stipulate to no more than a 15 day extension which must be in writing and filed with the Court.)

**DEFAULT:** If the defendant has not generally appeared and no extension has been granted, the plaintiff must request default within 45 days of the filing of the Certificate of Service.

THE COURT ENCOURAGES YOU TO CONSIDER UTILIZING VARIOUS ALTERNATIVES TO LITIGATION, INCLUDING MEDIATION AND ARBITRATION, PRIOR TO THE CASE MANAGEMENT CONFERENCE. MEDIATION SERVICES ARE AVAILABLE UNDER THE DISPUTE RESOLUTION PROGRAMS ACT AND OTHER PROVIDERS. SEE ADR INFORMATION PACKET AND STIPULATION.

YOU MAY ALSO BE ORDERED TO PARTICIPATE IN ARBITRATION PURSUANT TO CCP 1141.10 AT THE CASE MANAGEMENT CONFERENCE. THE FEE FOR THESE SERVICES WILL BE PAID BY THE COURT IF ALL PARTIES HAVE APPEARED IN THE CASE AND THE COURT ORDERS THE CASE TO ARBITRATION PURSUANT TO CCP 1141.10. THE CASE MANAGEMENT CONFERENCE WILL BE CANCELLED IF YOU FILE FORM SDSC CIV-359 PRIOR TO THAT HEARING

## SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

CASE NUMBER: 37-2008-00079382-CU-BT-CTL CASE TITLE: Struthers vs. UBS Financial Services Inc

## NOTICE TO LITIGANTS/ADR INFORMATION PACKAGE

You are required to serve a copy of this Notice to Litigants/ADR Information Package and a copy of the blank Stipulation to Alternative Dispute Resolution Process (received from the Civil Business Office at the time of filing) with a copy of the Summons and Complaint on all defendants in accordance with San Diego Superior Court Rule 2.1.5, Division II and CRC Rule 201.9.

## ADR POLICY

It is the policy of the San Diego Superior Court to strongly support the use of Alternative Dispute Resolution ("ADR") in all general civil cases. The court has long recognized the value of early case management intervention and the use of alternative dispute resolution options for amenable and eligible cases. The use of ADR will be discussed at all Case Management Conferences. It is the court's expectation that litigants will utilize some form of ADR – i.e. the court's mediation or arbitration programs or other available private ADR options as a mechanism for case settlement before trial.

## ADR OPTIONS

**1) CIVIL MEDIATION PROGRAM:** The San Diego Superior Court Civil Mediation Program is designed to assist parties with the early resolution of their dispute. All general civil independent calendar cases, including construction defect, complex and eminent domain cases are eligible to participant in the program. Limited civil collection cases are not eligible at this time. San Diego Superior Court Local Rule 2.31, Division II addresses this program specifically. Mediation is a non- binding process in which a trained mediator 1) facilitates communication between disputants, and 2) assists parties in reaching a mutually acceptable resolution of all or part of their dispute. In this process, the mediator carefully explores not only the relevant evidence and law, but also the parties' underlying interests, needs and priorities. The mediator is not the decision-maker and will not resolve the dispute – the parties do. Mediation is a flexible, informal and confidential process that is less stressful than a formalized trial. It can also save time and money, allow for greater client participation and allow for more flexibility in creating a resolution.

**Assignment to Mediation, Cost and Timelines:** Parties may stipulate to mediation at any time up to the CMC or may stipulate to mediation at the CMC. Mediator fees and expenses are split equally by the parties, unless otherwise agreed. Mediators on the court's approved panel have agreed to the court's payment schedule for county-referred mediation: $150.00 per hour for each of the first two hours and their individual rate per hour thereafter. Parties may select any mediator, however, the court maintains a panel of court-approved mediators who have satisfied panel requirements and who must adhere to ethical standards. All court-approved mediator fees and other policies are listed in the Mediator Directory at each court location to assist parties with selection. **Discovery:** Parties do not need to conduct full discovery in the case before mediation is considered, utilized or referred. **Attendance at Mediation:** Trial counsel, parties and all persons with full authority to settle the case must personally attend the mediation, unless excused by the court for good cause.

**2) JUDICIAL ARBITRATION:** Judicial Arbitration is a binding or non-binding process where an arbitrator applies the law to the facts of the case and issues an award. The goal of judicial arbitration is to provide parties with an adjudication that is earlier, faster, less formal and less expensive than trial. The arbitrator's award may either become the judgment in the case if all parties accept or if no trial de novo is requested within the required time. Either party may reject the award and request a trial de novo before the assigned judge if the arbitration was non-binding. If a trial de novo is requested, the trial will usually be scheduled within a year of the filing date.

**Assignment to Arbitration, Cost and Timelines:** Parties may stipulate to binding or non-binding judicial arbitration or the judge may order the matter to arbitration at the case management conference, held approximately 150 days after filing, if a case is valued at under $50,000 and is "at issue". The court maintains a panel of approved judicial arbitrators who have practiced law for a minimum of five years and who have a certain amount of trial and/or arbitration experience. In addition, if parties select an arbitrator from the court's panel, the court will pay the arbitrator's fees. Superior Court

**3) SETTLEMENT CONFERENCES:** The goal of a settlement conference is to assist the parties in their efforts to negotiate a settlement of all or part of the dispute. Parties may, at any time, request a settlement conference before the judge assigned to their case; request another assigned judge or a pro tem to act as settlement officer; or may privately utilize the services of a retired judge. The court may also order a case to a mandatory settlement conference prior to trial before the court's assigned Settlement Conference judge.

**4) OTHER VOLUNTARY ADR:** Parties may voluntarily stipulate to private ADR options outside the court system including private binding arbitration, private early neutral evaluation or private judging at any time by completing the "Stipulation to Alternative Dispute Resolution Process" which is included in this ADR package. Parties may also utilize mediation services offered by programs that are partially funded by the county's Dispute Resolution Programs Act. These services are available at no cost or on a sliding scale based on need. For a list of approved DRPA providers, please contact the County's DRPA program office at (619) 238-2400.

**ADDITIONAL ADR INFORMATION:** For more information about the Civil Mediation Program, please contact the Civil Mediation Department at (619) 515-8908. For more information about the Judicial Arbitration Program, please contact the Arbitration Office at (619) 531-3818. For more information about Settlement Conferences, please contact the Independent Calendar department to which your case is assigned. Please note that staff can only discuss ADR options and cannot give legal advice.

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| SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO | *FOR COURT USE ONLY* |
|---|---|
| STREET ADDRESS: 330 West Broadway<br>MAILING ADDRESS: 330 West Broadway<br>CITY, STATE, & ZIP CODE: San Diego, CA 92101-3827<br>BRANCH NAME: Central | |
| PLAINTIFF(S): Gail Struthers | |
| DEFENDANT(S): UBS Financial Services Inc | |
| SHORT TITLE: STRUTHERS VS. UBS FINANCIAL SERVICES INC | |
| **STIPULATION TO ALTERNATIVE DISPUTE RESOLUTION PROCESS (CRC 3.221)** | CASE NUMBER: 37-2008-00079382-CU-BT-CTL |

Judge: Jeffrey B. Barton Department: C-69

The parties and their attorneys stipulate that the matter is at issue and the claims in this action shall be submitted to the following alternative dispute resolution process. Selection of any of these options will not delay any case management time-lines.

- ☐ Court-Referred Mediation Program
- ☐ Court-Ordered Nonbinding Arbitration
- ☐ Private Neutral Evaluation
- ☐ Court-Ordered Binding Arbitration (Stipulated)
- ☐ Private Mini-Trial
- ☐ Private Reference to General Referee
- ☐ Private Summary Jury Trial
- ☐ Private Reference to Judge
- ☐ Private Settlement Conference with Private Neutral
- ☐ Private Binding Arbitration
- ☐ Other (specify): ______________________

It is also stipulated that the following shall serve as arbitrator, mediator or other neutral: (Name) ______________________

______________________

______________________

Alternate: (mediation & arbitration only) ______________________

Date: ______________________ Date: ______________________

______________________ ______________________
Name of Plaintiff Name of Defendant

______________________ ______________________
Signature Signature

______________________ ______________________
Name of Plaintiff's Attorney Name of Defendant's Attorney

______________________ ______________________
Signature Signature

(Attach another sheet if additional names are necessary). It is the duty of the parties to notify the court of any settlement pursuant to California Rules of Court, 3.1385. Upon notification of the settlement the court will place this matter on a 45-day dismissal calendar.

No new parties may be added without leave of court and all un-served, non-appearing or actions by names parties are dismissed.

IT IS SO ORDERED.

Dated: 03/06/2008 ______________________
JUDGE OF THE SUPERIOR COURT

*Gail Struthers v. UBS Financial Services, Inc.*
United States District Court - CASE NO. 08cv1381 H (JMA)

Judge Marilyn L. Huff

Courtroom 13

**DEFENDANT UBS FINANCIAL SERVICES INC.'S NOTICE OF MOTION AND MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATIONS OF JENNIFER NIES AND STEPHEN D. BIRD IN SUPPORT OF THEREOF**

# EXHIBIT "8"

DAVID E. ROSENBAUM, ESQ. 49735
484 South Euclid Avenue, Suite 105
Pasadena, California 91101
Tel: (626) 432-7422 FAX: (626) 792-5433

Attorney for Respondent and Counter-Claimant
GAIL STRUTHERS

# FINANCIAL INDUSTRY REGULATORY AGENCY

## LOS ANGELES, CALIFORNIA

UBS FINANCIAL SERVICES, INC.,

Claimant,

vs.

GAIL STRUTHERS,

Respondent.

GAIL STRUTHERS,

Counter-Claimant,

vs.

UBS FINANCIAL SERVICES, INC.,

Counter-Respondent

Case No. 07-02862

**STATEMENT OF COUNTER-CLAIM FOR:**

(1) INTENTIONAL MISREPRESENTATION

(2) NEGLIGENT MISREPRESENTATION

(3) VIOLATION OF STRUTHERS'S RIGHTS UNDER THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING LAW

(4) INVASION OF PRIVACY

(5) INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

(6) BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

(7) PARTIAL RESCISSION

(8) UNLAWFULLY PREVENTING EMPLOYMENT BY MISREPRESENTATION

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Counter-claimant GAIL STRUTHERS filed the Counterstatement of Claim against Claimant UBS FINANCIAL SERVICES, INC.

## GENERAL ALLEGATIONS

1. Counter-Claimant, GAIL STRUTHERS (hereinafter, "Struthers", is an individual who resides and has at certain times relevant hereto resided in the State of California, County of San Diego, and City of San Diego.

2. Counter-Respondent, UBS FINANCIAL SERVICES, INC. ("UBS," not in italics), is and at all times relevant herein was, a corporation organized under the laws of the State of Delaware, which does business in the State of California and has a principal place of business in the County of San Diego.

3. Struthers does not know the true names and capacities, whether individual, corporate, partnership or otherwise, of each of the Cross-Respondents designated herein as DOES 1 through 10 at this time and sue said Cross-Respondents herein under fictitious names. Each of them is a resident of and/or transacts business in the State of California. Struthers will ask leave of court for permission to amend this complaint to show the true names and capacities of said DOES when ascertained. Struthers is informed and believes and thereon alleges that each of the fictitiously named Cross-Respondents is indebted to Struthers as hereinafter alleged, and that Struthers's rights against such fictitiously named DOE Cross-Respondents arise from such indebtedness. Whenever reference is made herein to named Counter-Respondent UBS, said reference shall include these fictitiously named Doe Cross-Respondents.

4. With respect to each allegation contained herein that is alleged on Struthers's information and belief, said allegations are likely to have evidentiary support after Struthers is given a reasonable opportunity for further investigation and discovery.

5. Struthers is informed and believes and on that basis alleges that each of Cross-Respondents DOES 1 through 10 was the agent, partner, servant and/or employee of each of the other Cross-Respondents, and acted or failed to act as herein alleged in the course and scope of said agency, authority, partnership, and/or employment.

## FIRST CAUSE OF ACTION

**(Intentional Misrepresentation)**

6. Struthers incorporates herein by this reference paragraphs 1 through 5, above, and re-alleges them as if fully set forth herein.

7. Before March 7, 2006, Struthers was a securities broker employed at Morgan Stanley, with $55 million in assets under management. Struthers was generating approximately $500,000 per year in revenue, from which her take-home compensation was over $300,000 per year, plus benefits and pension & 401-K contributions. She was the No. 1 revenue-producing broker for her years of experience in Morgan Stanley, and, in that capacity, spoke at Morgan Stanley's annual national conference in 2005.

8. To induce Struthers to resign from Morgan Stanley and become employed by UBS, Cross-Respondent UBS made numerous material representations. UBS intended that Struthers would rely on said representations and would resign from her employment with Morgan Stanley and become employed by UBS.

9. Struthers justifiably relied on UBS's said material representations and, as a result, resigned from her employment with Morgan Stanley and became employed by UBS.

10. Unknown to Struthers, said representations were false and UBS knew them to be false when the representations were made.

11. In the alternative, said representations were false and UBS knew or by the exercise of reasonable care should have known that it did not know whether said representations were true or false.

12. When UBS made certain of said representations to Struthers, UBS was duty bound to speak the whole truth known to it concerning such matters, for where one speaks as to a specific subject, he must speak the whole truth in making such representation to the end that he does not conceal any facts which materially qualify those stated, for one who is asked for information must be truthful, and the telling of a half-truth calculated to deceive is fraud.

13. In the alternative, when UBS made such representations to Struthers, UBS was duty bound to speak the whole truth known to it concerning such matters in that UBS had exclusive knowledge of material facts not known to Struthers and UBS knew that these material facts were unknown to, or were beyond the reach of, Struthers.

14. In the alternative, when Cross-Respondents made such representations to Struthers, UBS was duty bound to speak the whole truth known to it concerning such matters in that UBS as prospective employer had a fiduciary or quasi-fiduciary duty of disclosure to a prospective employee under the circumstances alleged herein.

15. Had Struthers known that said representations were false, she would not have resigned from her employment with Morgan Stanley and would not have agreed to be employed by UBS.

16. As a proximate result of the foregoing, Struthers has suffered damages in an amount to be proven at trial.

17. Based on the foregoing, UBS's aforementioned conduct constituted willful and intentional misrepresentations, deceit, or concealment of material facts known to Cross-Respondents within the meaning of Civil Code § 1572. In addition, UBS engaged in said conduct maliciously in that it did so in conscious disregard of Struthers's rights. Accordingly, Cross-Respondent's conduct justifies an award of exemplary and punitive damages under Civil Code §3294.

**SECOND CAUSE OF ACTION**

**(Negligent Misrepresentation)**

18. Struthers incorporates herein by this reference paragraphs 1 through 5 and 7 through 16 above, and re-alleges them as if fully set forth herein.

19. When UBS made the said representations, it had no reasonable grounds for believing them to be true.

**THIRD CAUSE OF ACTION**

**(For Violation of Struthers's Rights Under the California Fair Employment and Housing Law)**

20. Struthers incorporates herein by this reference paragraphs 1 through 5 and 7 above, and re-alleges them as if fully set forth herein.

21. During Struthers's employment at Morgan Stanley, she became acquainted with Mr. Toby Ferner (herein, "Ferner"), another broker employed by Morgan Stanley.

22. Ferner left the employment of Morgan Stanley to become the manager of UBS's Carlsbad, California office. At all times mentioned herein, Ferner was Vice President and Branch Manager of UBS's Carlsbad, California office.

23. In 2006, Ferner approached Struthers with a proposal that she move from Morgan Stanley to UBS.

24. At all times during her career with Morgan Stanley, Struthers had and still has a mental disability, commonly known as 'bi-polar disorder.' That disability is controllable with medication that Struthers takes and posed no difficulty at Morgan Stanley, where Struthers was permitted to work from her home when necessary either because of the bi-polar disorder or because Struthers has children that she must care for.

25. Before becoming employed by UBS, Struthers informed Ferner of the bi-polar disorder and of her occasional need to work from home due to it and due to her children. Struthers further informed Ferner that, for these reasons, Struthers would occasionally need to work and place customers' orders from her home. In the course of dealings that led to her employment with UBS, Ferner represented that UBS would accommodate Struthers's said need to work and place customers' orders from her home.

26. On or about March 7, 2006, the Struthers commenced employment with UBS as a financial advisor in its Carlsbad, California office.

27. Approximately simultaneous with Struthers's commencement of employment, UBS also hired a financial advisor whose first name is Mike, but whose full name and location are currently unknown to Struthers.

28. In or about the spring and early summer of 2006, Mike engaged a course of sexual harassment of Struthers and other female employees in UBS's Carlsbad,

California office. Mike engaged in said harassment with the actual and constructive knowledge and consent of Cross-Respondent UBS.

29. Mike's sexual harassment of the Struthers consisted of sexual advances and demands, sexual assault, and sexually degrading remarks to Struthers. Mike engaged in similar conduct with respect to other women in UBS's Carlsbad, California office.

30. Within approximately one month after being hired, Struthers began complaining to Ferner about the above sexual harassment of Struthers and other female employees in UBS's Carlsbad, California office. Ferner took no action with respect to Mike's sexual harassment and, when Struthers complained that Mike sexually assaulted her, Ferber stated that Struthers could "take it" or could "take care of [herself]" or words to that effect.

31. In retaliation for Struthers's complaints about Mike's sexual harassment, Ferner on behalf of UBS took numerous actions against Struthers which eventually resulted in an environment in the Carlsbad office that was so hostile to Struthers that Struthers was unable to continue working in that office. These included, but are not limited to the following: Ferner violated Struthers's medical privacy, both within the office and outside. Disclosures concerning Struthers's medical condition were made to Struthers's Sales Assistant. In addition, UBS disclosed a series of adverse communications about Struthers's personnel status to her Sales Assistant who then sent them to Struthers. The said violations of privacy as to Struthers's Sales Assistant not only made it impossible for Struthers to work with the Sales Assistant, but also subjected Struthers to humiliation and ridicule, and caused Struthers to become a virtual pariah among the staff that Struthers depended on. In addition, Ferner made defamatory statements about Struthers to people in other securities firms, and to at least one of Struthers's customers. On information and belief, Struthers further alleges that Ferner made defamatory innuendos about her to others. When Struthers asked that Ferner honor the agreement that UBS would accommodate her need to work and place orders from her home Ferner refused. This refusal continued even after

Struthers's doctor sent UBS a letter in September 2006 stating that due to Struthers's medical disability and the environment in the Carlsbad office, she needed to work from home. Another example of the retaliation was that Ferner began dealing directly with Struthers's customers and attempted to persuade them to switch their accounts to Ferner or to other brokers in the office.

32. As a result of the foregoing and other wrongful conduct by Ferner and UBS, Struthers entered treatment and continues to be treated for mental disability due to the foregoing events. On or about October 31, 2006, Struthers wrote to Ferner (i) describing the foregoing and other intolerable working conditions and UBS's numerous breaches of agreements, (ii) informing him that these matters had caused Struthers to suffer mental disability and (iii) that Struthers's physician had advised that she was not to return to work under the existing working conditions. Despite the October 31, 2006 letter and Ferner's knowledge that the medical disability prevented Struthers from reporting for work in his office, Ferner continued to retaliate against Struthers by repeatedly insisting that she report to work by certain specific dates. This continued even after Struthers's physician submitted a letter from my doctor advising that Struthers was disabled and unable to report for work.

33. Ultimately, Struthers was placed on leave status and continued in that status from January 2007 through mid-May 2007. UBS provided Struthers no documentation as to the leave status or its length or expiration date. There was no communication between Struthers and UBS during the period of January 2007 through mid-May 2007.

34. From January 2007 through May 2007 and thereafter continuing to this date, Struthers has been under treatment for mental disability by her physician and mental health professionals, including psychiatrists. Struthers's mental disability increased in severity to the point that she was hospitalized from May 11 through May 17, 2007.

35. During that hospitalization, UBS on May 14, 2007, wrote to Struthers stating that her medical leave had expired on May 1, 2007, that she was required to report for work in Ferner's office on that date, that she failed to report, and that, as a result, she

was being discharged from UBS's employment, effective May 15, 2007.

36. One of the benefits that UBS offered to induce Struthers to resign from her employment at Morgan Stanley and to go to work for UBS was that upon Struthers's employment, UBS would pay Struthers the equivalent of her then-gross commissions – approximately $529,000, 75% in cash and 25% in stock. The cash portion, $396,717.00, was to be paid as a loan with a promissory not, which note would be forgiven over a six-year period of employment. The stock – valued at $132,239 – was to be in stock that was deposited in an escrow account. On May 25, 2007, UBS made written demand that Struthers repay the unforgiven balance of that promissory note, despite a provision that that the note would be forgiven if UBS discharged Struthers due to disability. As a result of the above termination, Struthers forfeited the additional $132,239 in stock.

37. Struthers is informed and believes and based thereon alleges that at approximately the same time as the above-described termination of her employment, UBS publicly disclosed that her employment had been terminated. Said public disclosure was not in response to any special request for such information. In the circumstances, said public disclosure contained a false representation that Struthers's employment was terminated for wrongdoing.

38. UBS, by its aforesaid conduct, has violated Struthers's rights under the California Fair Employment and Housing Act, Government Code §§ 12900 et seq.

39. As a direct and proximate result of UBS's conduct, Struthers has suffered damage in an amount to be proved at trial. Among other things, UBS's above conduct has caused Struthers to suffer emotional distress, humiliation, and mental anguish and has prevented and will in the future prevent Struthers from obtaining employment in the securities industry for the remainder of her career.

40. As alleged in the original Complaint, ¶39, Struthers has filed more than one charge of discrimination with the California Department of Fair Employment and Housing. On December 11, 2006, based on advice and instructions from her then-

attorney, Struthers tendered for filing by U. S. Mail a charge of discrimination based on the above actions that UBS engaged in during calendar year 2006. Struthers is informed and believes and based thereon alleges that said charge was properly addressed, with postage fully prepaid, and arrived at the San Diego office of the California Department of Fair Employment and Housing ["DFEH"], but was not docketed or processed through the oversight of the DFEH. By the time that a right to sue letter would have been received from the DFEH, had the charge been properly handled at the DFEH, Struthers was without legal representation and unable to comprehend the situation or the consequence of receiving no right to sue letter due to the disability cause and/or exacerbated by UBS. Struthers did not become aware of the non-docketing of said December 2006 charge until the undersigned so advised Struthers on or about February 25, 2008.

41. On or about March 5, 2008, Struthers filed her second charge of discrimination against UBS with the DFEH, this time through counsel, utilizing the DFEH Internet-based, automated charge filing system. The second charge is based on all wrongful conduct of UBS, including the continuing violations that began in 2006 and continued through portions of calendar year 2007; such has her termination and UBS's demand that she repay the above-described loan in May 2007. A true and correct copy of the right to sue letter obtained as to the second charge is attached hereto as Exhibit 1.

**FOURTH CAUSE OF ACTION**

**(Invasion of Privacy)**

42. Struthers incorporates herein by this reference paragraphs 1 through 5, 7 and 21 through 35 and 37 above, and re-alleges them as if fully set forth herein.

43. Struthers had a reasonable expectation of privacy in the medical information she disclosed to Mr. Ferner and to UBS.

44. Struthers had an expectation of privacy in the personnel information generated and maintained by Mr. Ferner and UBS as to her employment at UBS.

45. UBS's disclosures of private information concerning Struthers's medical

disability and personnel matters violated Struthers's privacy.

46. The disclosures by Cross-Respondent were public disclosures.

47. The facts disclosed about Struthers were private facts that Struthers desired to keep private.

48. The disclosure by Cross-Respondent of the above facts would be highly offensive to a reasonable person in Struthers's position.

49. UBS knew, or acted with reckless disregard of the fact, that a reasonable person in Struthers' position would consider said public disclosure highly offensive.

50. The said information did not have a substantial connection to a matter of legitimate public concern.

51. Struthers was harmed in that she was scorned and abandoned by her business associates, exposed to contempt and ridicule, suffered loss of reputation and standing in the community.

52. In addition, Struthers has suffered injury to her business and employment in an amount according to proof. Among other things, UBS's public disclosure of Struthers's termination has prevented and will in the future prevent Struthers from obtaining employment in the securities industry for the remainder of her career.

53. UBS's above-described conduct was a substantial factor in causing Struthers's harm.

54. In making said disclosures, UBS was guilty of oppression and malice. UBS engaged in said conduct in conscious disregard of Struthers's rights, and in violation of Civil Code §§1709 and 3343. Struthers therefore seeks an award of exemplary damages pursuant to Civil Code §3294.

**FIFTH CAUSE OF ACTION**

**(Intentional Infliction of Emotional Distress)**

55. Struthers incorporates herein by this reference paragraphs 1 through 5, 7, 21 through 37, and 43 through 52 above, and re-alleges them as if fully set forth herein.

56. The actions of UBS were outrageous.

57. UBS intended to cause Struthers emotional distress or were performed with reckless disregard of the probability that Struthers would severe emotional distress.

58. Struthers has suffered emotional damage. Among other things, Struthers has been unable to work and will be unable to work in her profession and occupation.

59. UBS's aforementioned outrageous conduct was a substantial factor in causing Struthers emotional distress and resulting damages in an amount to be proved at trial.

60. In doing the acts herein alleged, UBS acted knowingly, intentionally, and maliciously in that UBS engaged in said conduct in conscious disregard of Struthers's rights. Struthers therefore seeks an award of punitive and exemplary damages under Civil Code §3294.

**SIXTH CAUSE OF ACTION**

**(Breach of the Implied Covenant of Good Faith and Fair Dealing)**

61. Struthers incorporates herein by this reference paragraphs 1 through 5, 7, 21 through 36, and 43 through 52 above, and re-alleges them as if fully set forth herein.

62. By its aforesaid conduct, UBS breached the implied covenant of good faith and fair dealing of its contract with Struthers.

63. As a proximate result of the aforementioned conduct, Struthers has suffered damages in an amount be proved at trial.

**SEVENTH CAUSE OF ACTION**

**(Partial Rescission)**

64. Struthers incorporates herein by this reference paragraphs 1 through 5, 7, 21 through 36 above, and re-alleges them as if fully set forth herein.

65. Before Struthers announced her resignation from employment with Morgan Stanley, she was only aware of the terms of the loan and promissory note referred to in ¶36 above. After Struthers resigned from her employment with Morgan Stanley, and as a condition of employing her, UBS for the first time presented her with a promissory note that contained provisions that went far beyond what had been represented to her as the promissory note to be signed in exchange for the cash portion of the UBS

payment. Said promissory note contained such provisions as compulsory arbitration of all employment disputes and a provision for 'at will' employment status.

66. Struthers's apparent consents to the 'at will' employment agreement and the portions of the UBS promissory note other than the terms of the note and forgiveness thereof were not real, mutual, or free in that they were obtained through economic duress. Said duress arose from the fact that she was presented with said agreements and note after she had resigned from her employment with Morgan Stanley and had no alternative other than to sign such note with such provisions.

NOTICE OF RESCISSION AND DEMAND FOR RETURN OF CONSIDERATION:

67. With respect to each of the above ground for partial rescission, Struthers would not have consented to the above portions of the promissory note had it not been for the circumstances alleged above. Accordingly, Etess is entitled to rescind those portions of the written contract. Since neither party has given consideration for those portions of the promissory note, there is no consideration to be returned.

68. As a result of the foregoing, all portions of the promissory note other than the terms of the loan, payment, and forgiveness of the amount due should be rescinded.

## EIGHTH CAUSE OF ACTION

### (Unlawfully Preventing Employment by Misrepresentation)

69. Struthers incorporates herein by this reference paragraphs 1 through 5, 7, 21 through 36, and 41 through 52 above, and re-alleges them as if fully set forth herein.

70. As a proximate result of the public disclosure of UBS's termination of Struthers's employment, without any special request for such disclosure, Struthers has been prevented from obtaining employment as a broker or the equivalent in the securities industry for the remainder of her working life, to Struthers's damage in an amount to be proven at trial.

71. Said public disclosure violated Labor Code §§ 1050 and 1053. Accordingly, Struthers is entitled to treble damages as provided in Labor Code § 1054.

72. Said public disclosure constituted willful and intentional misrepresentation, deceit, and concealment of material facts known to UBS within the meaning of Civil Code §1572. In addition, UBS engaged in said conduct maliciously in that it did so with a willful and conscious disregard of Struthers's rights. Accordingly, UBS conduct justifies an award of exemplary and punitive damages under Civil Code §3294.

WHEREFORE, Struthers for judgment as follows:

1. For compensatory damages in an amount to be proven at trial as to all causes of action other than the Seventh Cause of Action;

2. With respect to the First, Third, Fourth, Fifth and Eighth Causes of Action, for punitive and exemplary damages according to proof;

3. With respect to all causes of action:

a. For pre-judgment interest as allowed by law;

b. For attorney fees and costs as authorized by law;

c. For costs of suit herein incurred; and

d. For such other and further relief as the court deems proper.

DATED: March 31, 2008

DAVID E. ROSENBAUM
Attorney for GAIL STRUTHERS

# EXHIBIT 1

STATE OF CALIFORNIA - STATE AND CONSUMER SERVICES AGENCY ARNOLD SCHWARZENEGGER, Governor

**DEPARTMENT OF FAIR EMPLOYMENT & HOUSING**
1350 FRONT STREET, SUITE 3005, SAN DIEGO, CA, 92101
(619) 645-2681
www.dfeh.ca.gov

March 05, 2008

STRUTHERS, GAIL
3546 MT. EVEREST BLVD.
SAN DIEGO, CA 92111

RE: E200708D5077-00
STRUTHERS/UBS FINANCIAL SERVICES, INC.

Dear STRUTHERS, GAIL:

**NOTICE OF CASE CLOSURE**

This letter informs that the above-referenced complaint that was filed with the Department of Fair Employment and Housing (DFEH) has been closed effective March 05, 2008 because an immediate right-to-sue notice was requested. DFEH will take no further action on the complaint.

This letter is also the Right-To-Sue Notice. According to Government Code section 12965, subdivision (b), a civil action may be brought under the provisions of the Fair Employment and Housing Act against the person, employer, labor organization or employment agency named in the above-referenced complaint. The civil action must be filed within one year from the date of this letter.

If a federal notice of Right-To-Sue is wanted, the U.S. Equal Employment Opportunity Commission (EEOC) must be visited to file a complaint within 30 days of receipt of this DFEH *Notice of Case Closure* or within 300 days of the alleged discriminatory act, whichever is earlier.

DFEH does not retain case files beyond three years after a complaint is filed, unless the case is still open at the end of the three-year period.

Sincerely,

Belinda LeDoux

Belinda LeDoux
District Administrator

cc: Case File

JENNIFER NIES
ASSOCIATE DIRECTOR, CLIENT RELATIONSHIP MANAGER
UBS FINANCIAL SERVICES INC.
1000 HARBOR BLVD., 10TH FLOOR
WEEHAWKEN NJ 07086

## PROOF OF SERVICE

STATE OF CALIFORNIA )
) ss.
COUNTY OF LOS ANGELES )

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 484 So. Euclid Avenue, Suite 105, Pasadena, California 91101.

On March 31, 2008, I served the foregoing document described as:

**STATEMENT OF COUNTER-CLAIM FOR:**

(1) INTENTIONAL MISREPRESENTATION

(2) NEGLIGENT MISREPRESENTATION

(3) VIOLATION OF STRUTHERS'S RIGHTS UNDER THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING LAW

(4) INVASION OF PRIVACY

(5) INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

(6) BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

(7) PARTIAL RESCISSION

(8) UNLAWFULLY PREVENTING EMPLOYMENT BY MISREPRESENTATION

on the interested parties by transmitting a true copy thereof to the following individual at the below-listed facsimile number:

Stephen D. Bird, Esq.
1200 Harbor Blvd.
Weehawken, NJ 07086
FAX: 201-352-7291

No errors were reported during said transmissions.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct

Executed on March 31, 2008, at Pasadena. California.

David E. Rosenbaum

DAVID E. ROSENBAUM

*Gail Struthers v. UBS Financial Services, Inc.*
United States District Court - CASE NO. 08cv1381 H (JMA)

Judge Marilyn L. Huff

Courtroom 13

**DEFENDANT UBS FINANCIAL SERVICES INC.'S NOTICE OF MOTION AND MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATIONS OF JENNIFER NIES AND STEPHEN D. BIRD IN SUPPORT OF THEREOF**

# EXHIBIT "9"

**DAVID E. ROSENBAUM**
ATTORNEY AT LAW
484 SOUTH EUCLID AVENUE, SUITE 105
PASADENA, CALIFORNIA 91101
(626) 432-7422 FAX (626) 792-5433

April 28, 2008

**By facsimile**
Ms. Elaine N. Kohn
Senior Case Administrator
FINRA Dispute Resolution
Western Dispute Resolution
300 South Grand Avenue
Los Angeles, CA 90071
FAX: 301-527-4766

Re: UBS v. Struthers, Case Number 07-02862: Fee has been paid; New List of Arbitrators

Dear Ms. Kohn:

We spoke in early April about this case. I advised you at the time that, due to the allegations in Struthers' Counter-Claim, this has become an employment discrimination case. At the time, you advised you advised that a new list of arbitrators for employment matters would be sent out for the parties to select a new arbitration panel. You said that the list would be sent out upon receipt of UBS's response to the Struthers' Counter-Claim, unless the parties agreed that a new list should be sent out earlier. Counsel for UBS and I have agreed (i) that a new arbitrator list should be sent out immediately and (ii) to extend the time for UBS to respond. I enclose a copy of Mr. Bird's letter, to which I have agreed. Could you arrange for the list to be sent out forthwith?

In early April, you also advised that I needed to pay a $200.00 fee for FINRA arbitration, which I did with a notation of the FINRA case number. I thereafter received a letter from you dated April 16, 2008, indicating that FINRA had not received the payment. If my payment and your letter crossed in the mail, I assume nothing further is required. Otherwise, please advise if you have not received my check and I will replace it with another.

Thank you for your assistance in this matter

Very truly yours,

David E. Rosenbaum

cc: Stephen D. Bird, Esq. (by facsimile)

*Gail Struthers v. UBS Financial Services, Inc.*
United States District Court - CASE NO. 08cv1381 H (JMA)

Judge Marilyn L. Huff

Courtroom 13

**DEFENDANT UBS FINANCIAL SERVICES INC.'S NOTICE OF MOTION AND MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATIONS OF JENNIFER NIES AND STEPHEN D. BIRD IN SUPPORT OF THEREOF**

# EXHIBIT "10"

**UBS FINANCIAL SERVICES INC.**
1200 Harbor Boulevard, 10th Floor
Weehawken, New Jersey 07086
By: Stephen D. Bird, Esq.
Phone: (201) 352-8439
Facsimile: (201) 352-7291

Attorney for Claimant/Counterclaim Respondent
UBS Financial Services Inc.

**FINRA DISPUTE RESOLUTION, INC.**

| | |
|---|---|
| In the Matter of the Arbitration between<br><br>UBS FINANCIAL SERVICES INC.,<br><br>Claimant/Counterclaim Respondent,<br><br>vs.<br><br>GAIL STRUTHERS,<br><br>Respondent/Counterclaim Claimant. | FINRA Arbitration No. 08-00104 |

**ANSWER TO COUNTERCLAIM**

Claimant/Counterclaim Respondent UBS Financial Services Inc. ("UBSFS" or "the Firm"), in answer to the Counterclaim filed by Respondent/Counterclaim Claimant Gail Struthers ("Struthers"), states as follows:[1]

## I. INTRODUCTION

Through her Counterclaims, Struthers engages in a post-hoc fabrication of the events and circumstances leading to the termination of her employment in May 2007. Struthers' allegations are nothing more than a blatant and transparent attempt to avoid honoring her incontestable

[1] Respondent reserves the right to supplement this Answer. The purpose of this Answer is to explain Respondent's defenses to the Counterclaim's allegations without responding on an allegation-by-allegation basis. Accordingly, should any specific allegation of wrongdoing not be specifically addressed in this response, it is denied.

obligation to repay the $326,696.44 principal balance plus interest under the terms of her employee forgivable loan ("EFL").

After joining UBSFS in February 2006 and collecting a $396,717.00 up front loan, Struthers engaged in a regular and persistent pattern of not showing up to work and not alerting management of her whereabouts. After approximately six months of this misconduct – during which management continually counseled Struthers respecting the need for her to report to work or contact management if she believed she would be unable to work—Struthers essentially stopped coming to work in September 2006. Despite numerous efforts by UBSFS to work with Struthers to enable her to perform the essential functions of her job as a financial advisor ("FA"), Struthers refused to work with management and, other than providing a brief and cryptic note from her physician indicating that Struthers needed to "work from home," Struthers refused to provide any information to the Firm respecting her failure to report to work. Instead, in response to management's efforts to work with her, Struthers lodged an internal complaint with the Firm alleging various claims of "sexual harassment," breach of contract and other allegations—all of which appear to be the same allegations she advances in her Counterclaim.

Consistent with Firm policy, UBSFS investigated Struthers' allegations. The Firm found that all of these allegations were unfounded and informed Struthers of these findings on December 6, 2006 in a detailed letter. After receiving this letter, Struthers, who had not reported to work on a regular basis since at least September 2006, filed for, and was granted by UBSFS' third party administrator -- Cigna Group Insurance ("Cigna") -- short term disability ("STD") leave under the Firm's STD Plan on December 8, 2006. Struthers would never return to active employment with UBSFS again.

Cigna advised Struthers on April 24, 2007 that her approved STD leave would expire and that her "return to work date" was May 1, 2007. Despite this notification, Struthers did not return to work on May 1, 2007, nor did she contact anyone at UBSFS respecting her failure to return to work. Though Firm policy dictates that Struthers' employment could be terminated after three days of her not returning to work or contacting management with a reason for her failure to show up to work, the Firm did not immediately act to terminate her employment. However, after Struthers did not show up to work or contact anyone in management respecting her failure to return from STD leave, the Firm terminated her employment on May 15, 2007. Thereafter, Struthers contacted the Firm and claimed that she had a valid medical excuse for not showing up to work after May 1, 2007 and for not contacting anyone in management after that date. Though under no obligation to do so, the Firm informed Struthers that it would reconsider reinstating her employment if she could substantiate her allegations with documentary proof. Struthers, however, never did this. Instead, she has refused to pay her outstanding EFL and has responded to UBSFS' effort to collect that loan by instituting frivolous Counterclaims. As set forth below, the Panel should deny Struthers' requested relief and grant the relief UBSFS seeks in its Statement of Claim.

## II. STRUTHERS' ALLEGATIONS

Struthers alleges her UBSFS Branch Office Manger (Toby Ferner) somehow induced her to leave her prior employment with Morgan Stanley DW Inc. to join UBSFS by "misrepresenting" to her that she would not have to report to work and instead could work from home. (Counterclaim, First and Second Causes of Action). Struthers also alleges she was "sexually harassed" by an essentially unnamed a co-worker and "retaliated" against after complaining about the alleged harassment, in violation of the California Fair Employment and Housing Act ("FEHA"), Government Code §§ 12900 et seq. (Counterclaim, Third Cause of Action). Further, Struthers claims UBSFS (through Ferner) violated her "privacy rights" by disclosing to the UBSFS Client Service Associate ("CSA") who worked with Struthers "private information concerning [her] medical disability and personnel [sic] matters," in violation of California Civil Code §§ 1709 and 3343. (Counterclaim, Fourth Cause of Action). Struthers relies upon all of these contentions in support of an additional allegation that the Firm somehow intentionally inflicted emotional distress upon her. (Counterclaim, Fifth Cause of Action).

Additionally, Struthers seeks to avoid her EFL obligation under the following theories: breach of an "implied covenant of good faith and fair dealing" (Counterclaim, Sixth Cause of Action) and "partial rescission" (Counterclaim, Seventh Cause of Action). Finally, Struthers contends that the Firm violated Labor Code section 1050 by "preventing her from securing employment on account of its "public[] disclos[ure of] its termination of [her] employment without any special request for such disclosure." (Counterclaim, Eighth Cause of Action). All of these claims are without merit and should be dismissed.

## III. FACTUAL BACKGROUND

### A. UBSFS' Hiring of Struthers

At all relevant times, Lee Tripodi was the Complex Manager of the Firm's Carlsbad, Rancho Bernardo and La Jolla Branches, and Ferner, who reported to Tripodi, was the Carlsdbad Branch Office Manager.

In or about the Fall of 2005, after learning that Ferner had become the Branch Manager of the Carlsbad Branch Office, Struthers – not the other way around as alleged in the Counterclaim – contacted Ferner and inquired about employment opportunities at Ferner's branch. After Struthers contacted Ferner, he directed her to speak with Tripodi. All of Struthers' further substantive discussions regarding potential employment opportunities with UBSFS did not involve Ferner, but were between Struthers and Tripodi. Struthers acknowledged these facts in her resignation letter to Morgan Stanley, writing that Ferner "never contacted [her] about joining UBS," she enjoyed working with Ferner and she "consider[ed] [him] to be one of [her] best friends."

UBSFS hired Struthers as an FA in its Carlsbad Branch Office on February 16, 2006. At no time before she was hired did Struthers inform Triodi, Ferner or anyone else at UBSFS of a need to work from home because of her bipolar disorder or childcare needs, which alleged request, because of regulatory requirements, would have required special approvals and had other logistical obstacles. The terms and conditions of Struthers' employment were set forth in a February 6, 2006 Letter of Understanding ("LOU"), which provides, in pertinent part, that "it contains the entire understanding between UBS Financial Services and you concerning this subject matter and fully supersedes all prior agreements, understandings, discussions, negotiations, whether written or oral, between UBS Financial Services and you." (Exhibit A). The LOU also makes clear that that Struthers was an "at-will" employee, meaning that her employment could be "terminated with or without cause and without notice at any time at the option of [Struthers] or UBS...." (Exhibit A).

The LOU also made clear that Struthers was "required to adhere to all UBS Financial Services policies and procedures, including, but not limited to, the Code of Conduct [and] the Employee Handbook." (Exhibit A). In addition to acknowledging the terms and conditions set forth in the LOU, Struthers affirmatively acknowledged her at-will employment status and her obligation to abide by Firm policy on February 16, 2006. Specifically, Struthers acknowledged the following:

> I hereby acknowledge that I have access to the Web site that contains the Firm's Employee Handbook. I acknowledge that I have an obligation to read, understand and adhere to the Firm's policies, procedures and ethical standards set forth in the Employee Handbook Web site referenced above.
>
> I acknowledge that I have read and agree to abide by the policies outlined on the Web site. I understand that the Firm, at its discretion and without notice, may add to, modify, change or rescind any of its policies, plans, practices,

> procedures or guidelines in whole or in part, at any time. I also understand that I am responsible for familiarizing myself with updates to these policies.
>
> I understand that the status of my employment is that of an at-will employee unless contracted otherwise in a document signed by the President or his authorized designee. As such, my employment and compensation can be terminated at any time, at the option of either UBS Financial Services Inc. or myself. I further understand that no representative of the Firm, other than the President or his authorized designee, has the authority to enter into any agreement for employment for any specified period of time or to make any agreement contrary to the foregoing.

(Exhibit B).

As part of her compensation package, the Firm provided Struthers' with an up-front EFL in the amount of $396,717, which is the subject of UBSFS' Statement of Claim in this matter. Additionally, UBSFS agreed to pay Struthers a $15,000 monthly salary for the first three months of her employment. (Exhibit A).

**B. Struthers Collects Her Up-Front Loan and Generous Salary, But Rarely Shows Up to Work**

Almost immediately after she joined UBSFS and collected her generous EFL, Struthers failed to show up to work and failed to notify branch management in advance of her absences. Indeed, beginning in March 2006, there were numerous occasions on which Struthers was absent from work, without excuse and/or explanation. Specifically, during the period between March and July 2006 she failed to report to work, and failed to advise branch management that she would not be reporting to work, on at least **34 occasions**. Additionally, on the few days on which Struthers would report to work, she usually arrived at work late, and/or left work early – after having worked only a few hours.

FAs at UBSFS do not receive allotted sick days. Despite this fact, and the fact that Struthers was utterly failing to show up to work on a regular basis and not apprising management of her absences in advance, management did not terminate her employment. Rather, Ferner, who, as earlier noted, Struthers considered to be one of her "best friends," spoke with her on several occasions regarding her unexcused and/or unexplained absences from work. Ferner advised Struthers that her conduct constituted a violation of the Firm's Attendance and Punctuality policy, which provides:

> You are required to maintain regular and punctual attendance at work. You are expected to be in your work area and ready to begin work at your designated starting time. If you anticipate a delay or absence, you are responsible for telephoning your supervisor or manager directly, well in advance of your scheduled arrival time. Unexcused or unexplained absences may lead to disciplinary action, up to and including termination of employment.

(Exhibit C).

Frustrated with Struthers' failure to improve her attendance, Ferner spoke with Struthers on September 15, 2006 about her continued abuse of the Firm's Attendance and Punctuality policy. Neither before or during this conversation did Struthers inform Ferner that her absence from work was due to her alleged bi-polar disorder or to any alleged improper workplace conduct. Nevertheless, even after this discussion, Struthers continued to fail to report to work and/or contact him – or anyone else in branch management – regarding the reasons for her failure to report to work. Indeed, Struthers did not report to work on September 18, 19, 20, 21 or 22, 2006. She also did not advise Ferner, or anyone else in branch management, regarding the reasons that she did not report to work.

As a result, Ferner sent Struthers a letter on September 22, 2006, recounting her abuse of the Firm's attendance policy over the prior six months, and reminding her of the Firm's Unexcused Absences policy, which provides:

> If you fail to meet your regular work schedule or fail to call your supervisor with a valid reason any days you are absent, unless extenuating circumstances exist, within three (3) concurrent business days of absence, we will consider you to have abandoned your employment with the Firm. As a result, your employment with the Firm will be terminated . . . .

(Exhibit C; emphasis added). Ferner concluded the letter as follows:

> Please be advised that, if you do not report to work by Tuesday, September 26, 2006, and/or you do not contact me with an explanation regarding the reasons for your unexcused absence from work, UBS Financial Services will have no alternative but to deem that you have abandoned your job and terminate your employment with the Firm effective September 26, 2006.

(Exhibit D).

### C. Despite Struthers' Failure to Come to Work, UBSFS Management Attempts to Work With Her

Despite Ferner's letter, Struthers did not return to work. Instead, she submitted a note to Ferner from her physician on September 25, 2006 stating, "this patient's medical condition prevents her [from] working in the office environment until she stabilizes. She is able to work from home." (Exhibit E). In response to this note, Ferner informed Struthers by letter dated September 25, 2006 that the Firm would "work with [her] to determine what, if any, accommodations are appropriate and medically necessary to assist [her] in performing the duties and functions of [her] position." (Exhibit F). His letter also informed Struthers of the following:

> In order to make this determination, we ask that you please provide us, as soon as possible, with specific information from your medical provider regarding the nature of your "medical issue." Among other information, we ask that your medical provider please provide us with: documentation regarding the nature of your "medical issue;" information concerning how your "medical issue" affects your ability to perform the duties and responsibilities of your position; the nature and extent of any limitations and/or restrictions you have as a result of your "medical issue;" how working at home is medically necessary to enable you to perform the duties of your position; and any alternative accommodations suggested by your medical provider that would enable you to perform the duties of your position. Please know that we would be happy to speak directly with your medical provider to discuss these issues with him/her.
>
> Please know that business needs dictate that we receive this information as soon as possible. Thus, we ask that you please provide us with the requested information by no later than Monday, October 2, 2006.

(Exhibit F). Struthers, however, unjustifiably refused to provide this information. Nonetheless, rather than terminating her employment as it could have, UBSFS attempted to work with Struthers. Indeed, on October 3, 2006, Ferner wrote the following to Struthers:

> I want to reiterate that the Firm would like to work with you to determine what, if any, accommodations are appropriate and medically necessary to assist you in performing the duties and functions of your position. Please know that, in order to make this determination, the Americans with Disabilities Act (the "ADA"), as well as California law, permits UBSFS to request that you provide information from your medical provider regarding your medical condition, as well as the limitations and/or restrictions that your condition presents. This information is critical in order to determine an appropriate accommodation for your condition. Pursuant to the ADA, and California law, we, again, ask that your medical provider please provide us, as soon as possible, with the following: information concerning how your medical condition affects your ability to perform the duties and responsibilities of your position; the nature and extent of any limitations and/or restrictions you have as a result of your condition; how working at home is medically necessary to enable you to perform the duties of your position; and any alternative accommodations suggested by your medical provider that would enable you to perform the duties of your position.
>
> Please know that business needs dictate that we receive this information as soon as possible. Thus, we ask that you please provide us with the requested information by no later than Wednesday, October 11, 2006.
>
> Thank you for your anticipated cooperation in this matter.

(Exhibit G).

Despite management's reasonable attempts to work with Struthers, she did not provide the requested information, nor did she return to work. Instead, on October 10, 2006, she requested an unspecified period of time to "seek advice" from a legal professional. Though under no obligation to do so, management accommodated Struthers' request. Ferner wrote the following to Struthers on October 16, 2006:

> As previously stated, the Firm would like to work with you to determine what, if any, accommodations are appropriate and medically necessary to assist you in performing the duties and functions of your position. Please know that the Firm cannot accommodate your condition without your cooperation. Accordingly, the Firm has requested, only, that you provide us with enough information that will enable us to work with you in finding an appropriate accommodation.
>
> Despite our requests, the only information that you have provided thus far is a brief note from your physician, stating only that you are "able to work from home." In his note, your physician does not provide any information regarding your condition, the limitations and/or restrictions you have as a result of your condition, why you are unable to work in an office environment – or any other

information that would enable us to work with you to find an appropriate accommodation. Your physician's note also does not state how working at home is medically necessary to enable you to perform the duties of your position. We, again, ask that you please provide such information. In addition, because working at home, on a daily basis, would impose an undue hardship on the Firm, we again ask that you please provide any alternative accommodations suggested by your medical provider that would enable you to perform the duties of your position.

As you requested, we will provide you with additional time in which to obtain this information. However, because your absence from the office is becoming a hardship on your clients, and your co-workers, we ask that you please provide us with the requested information by Tuesday, October 31, 2006. Please know that this date is almost 40 days since the Firm requested that you provide the information.

Thank you for your anticipated cooperation in this matter.

(Exhibit H).

**D. Struthers Rejects UBSFS' Efforts to Work With Her and Instead Responds With Internal Complaints of Alleged Misconduct**

Rather than provide the requested information by October 31, 2006, Struthers responded on that date with a letter alleging, for the first time, claims of misrepresentation, "breach of contract," fraud, "sexual harassment," and "defamation." (Exhibit I). Struthers also claimed the Firm had placed "onerous working conditions" on her brother (who worked with her). (Exhibit I). She reiterated these allegations in a November 3, 2006 e-mail to Ferner. (Exhibit J). Struthers still did not return to work as of that date and had not provided the information the Firm requested concerning her claim that she needed to work for home.

Consistent with its policy, the Firm investigated Struthers' allegations by having UBSFS Client Relationship Manager Jennifer Nies conduct an investigation. On December 6, 2006, Nies sent Struthers an extensive seven page, single-spaced letter detailing the findings of her investigation and informing Struthers that she could not corroborate any of her allegations. (Exhibit K). Nies concluded the letter as follows:

> With regard to your employment status with the Firm, because you have not provided any of the information that we have requested, since September 22, 2006, concerning your "medical issue," and because there do not appear to be any issues in your letters that would preclude you from working in the office at the present time and/or would require you to work solely from home, we ask that you report to work by next **Monday, December 11, 2006.** As you know, your continued absence from the office has become a hardship on your clients, and your co-workers. If you need any assistance in returning to work, or in performing the essential functions of your position, please let me know. You can be assured that any medical information that you provide to me will be held in strict confidence and will be provided only to those individuals with a need to know.
>
> Thank you for your anticipated cooperation in this matter.

(Exhibit K, bold emphasis in original, footnotes omitted).

**E. Struthers Goes Out on STD Leave and Never Returns to Work**

After Nies sent her investigatory findings to Struthers on December 6, 2006, Struthers went on STD leave on December 8, 2008. After going out on STD, Struthers would never return to work again. The Firm's STD program is managed and administered by Cigna. According to the Firm's Employee Handbook, when an employee is on leave, "it is [the employee's] responsibility to periodically contact [his or her] manager regarding [his or her] status." (Exhibit L, emphasis added). This too Struthers did not do. In addition, on or about April 24, 2007, Cigna informed Struthers that her STD leave would expire on May 1, 2007, and that she was expected to return to work at that time. Struthers, however, failed to return to work on May 1, 2007 and did not contact Ferner or anyone else in branch management regarding her continued absence. This violated Firm policy, which provides:

> If you fail to return from leave and meet your regular work schedule or fail to call your supervisor with a valid reason for your absence within three (3) consecutive business days of your expected return date, we will consider you to have abandoned your employment with UBS Financial Services Inc. Your employment with the Firm will be terminated....

(Exhibit C).

Despite the fact that Firm policy provides that UBSFS could terminate an employee who fails to report to work within three business days, the Firm did not do so. Rather, it was only after Struthers had been absent from work, without excuse, for two weeks after her return to work date that it notified her that it was terminating her employment. Indeed, having not heard from Struthers, Nies sent her a letter on May 14, 2007 informing her as follows:

> As you know, you went out on a Short Term Disability Leave on December 8, 2006 and were approved through May 1, 2007. You have not returned to work and have not notified is as to your intention to return to work. Consequently we will assume that you have abandoned your employment with UBS and your employment will be terminated effective May 1, 2007.

(Exhibit M).

In response to Nies' letter, Struthers contacted the Firm on May 26, 2007, alleging that she had not contacted the Firm respecting her return to work and had not returned to work after her STD leave expired because she had been hospitalized at Sharp Mesa Vista Hospital. Based upon Struthers' allegation, Nies wrote to Struthers on May 30, 2007, informing her as follows, in relevant part:

> The Firm will consider reinstating your employment. However, in order to do so, we need you to provide us with the documentation referenced in your letter, substantiating your stay at Sharp Mesa Vista Hospital. In addition, we ask that you provide, as soon as possible, documentation indicating the date upon which you will be able to return to work. Please note that, if you need additional leave, then you must complete and return the appropriate paperwork and authorization forms as soon as possible. If you would like the Firm to reconsider the termination of your employment, I need you to provide me with this documentation and information by Thursday, June 6, 2007.
>
> Thank you for your anticipated cooperation in this matter. If you have any questions, please do not hesitate to contact me.

(Exhibit N). In response, Struthers had her physician (Dr. Fidaleo) send a letter to Nies on June 1, 2007, indicating that Struthers had been hospitalized from May 11, 2007 through May 17, 2007. (Exhibit O). Other than having her physician send this note, Struthers did not comply with any of the remaining requests Nies made in her May 30 letter.

That being so, Nies wrote the following to Struthers on June 14, 2007, in relevant part:

> [W]ith regard to the letter from Dr. Fidaleo, please note that, in his letter, Dr. Fidaleo states that you were hospitalized from May 11 through May 17, 2007. Accordingly, Dr. Fidaleo's note does not explain why you were unable to return to work, or at least contact your supervisor regarding your inability to return to work, on or before May 1, 2007. Indeed, as stated above, CIGNA advised you on April 24, 2007, that your leave was going to expire on May 1, 2007. Dr. Fidaleo's note does not explain why you failed to contact CIGNA and/or the Firm between April 24 and May 1.
>
> Accordingly, based on the information that you have provided thus far, we are unable to reinstate your employment. However, if you have additional information that explains why you were unable to return to work, or to contact CIGNA and/or your supervisor regarding your inability to return to work, during the period of April 24 through May 1, we would be happy to reconsider reinstating your employment. Please let me know if you do have such information at your earliest convenience.
>
> Thank you for your anticipated cooperation in this matter. If you have any questions, please do not hesitate to contact me.

(Exhibit P). Struthers never provided the requested information. Rather, she alleges in her initial January 30, 2008 Answer in this matter that "[t]he simple fact is that [she is] disabled and remain[s] disabled and unable to work even now." (Exhibit Q). Struthers, however, has not provided any information to substantiate this allegation despite numerous requests.

## IV. ARGUMENT

The above facts, including Nies' detailed December 6, 2006 letter to Struthers, demonstrate that Struthers' Counterclaims are meritless. Struthers' Counterclaims also fail for additional legal reasons, some of which are set forth below.[2]

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[2] As Struthers' Counterclaims are vague with respect to numerous factual allegations, other than denying the allegations, UBSFS cannot respond any more fully at this point. That being so, the factual and legal positions in this Answer shall not constitute a waiver of any factual and/or legal defenses that UBSFS has not asserted herein.

A. Intentional and Negligent Misrepresentation.

Struthers alleges misrepresentation, claiming that Ferner informed her prior to her hire that she did not need to report to the office to service Firm clients. (Counterclaim, First and Second Causes of Action). These claims fail as a matter of fact and law.

The LOU, executed prior to Struthers' joining UBSFS, did not guarantee Struthers any such right. Further, the LOU specifically superseded all previous representations and understandings, providing as follows: "[this] Letter contains the entire understanding between [UBSFS] and you concerning this subject matter and fully supersedes all prior agreements, understandings, discussions, negotiations, whether written or oral, between [UBSFS] and you." Accordingly, Struthers cannot assert claims based on any alleged representations not contained in the LOU. See Pacific State Bank v. Greene, 110 Cal.App.4th 375, 390-392 (2003)(parol evidence rule bars evidence of promissory fraud—i.e., where a party promises to perform an act that it has no intention of doing).

Struthers' claim fails for yet another independent reason. Even if Ferner made such a representation (which he did not), Struthers' reliance upon it would not have been reasonable. This is because, as Struthers' herself has previously admitted, all of her pre-hire substantive discussion respecting the terms and conditions of her employment with UBSFS were with Ferner's supervisor, Tripodi, and not Ferner. See Pacific State Bank, 110 Cal.App.4th at 393 (party claiming misrepresentation of fact must show "reasonable reliance" on misrepresentation); Larian v. Larian, 123 Cal.App.4th 751, 763 (claim for fraud in the execution of a contract requires that party "not have acted in an objectively unreasonable manner").

B. Violation of FEHA – Sexual Harassment and Retaliation

Struthers alleges she was "sexually harassed" and that, after she complained about such purported harassment, Ferner "retaliated" against her by (i) disclosing Struthers' medical condition to the CSA that was assigned to Struthers, (ii) "defaming" her to unnamed third parties, (iii) "repeatedly insisting that she report to work by certain specific dates," and (iv) terminating her employment. (Counterclaim, ¶¶27-32). These claims fail for various reasons.

i. **Time-Barred Claims**

With the exception of her retaliatory termination claim, Struthers' FEHA claims are time barred. In order to advance a FEHA claim, Struthers was required to first exhaust her administrative remedies by filing a complaint with the California Department of Fair Employment and Housing ("DEFH") and obtaining from the DFEH a notice of right to sue. Romano v. Rockwell Internat., Inc., 14 Cal.4th 479, 492 (1996). "The timely filing of an administrative complaint is a prerequisite to the bringing of a civil action for damages under the FEHA." Ibid. Under Government Code section 12960(d), Struthers had to file her complaint with DEFH within "one year from the date upon which the alleged unlawful practice ... occurred."

Here, Struthers did not file her complaint with DEFH until March 5, 2008, which means that any alleged unlawful practices that occurred prior to March 5, 2007 are time barred. As earlier noted, Struthers went on STD leave on December 8, 2006. As such, she could not have been "sexually harassed" after that date because she did not report to work. Additionally, other than Struthers's termination, which occurred in May 2007, Struthers' allegations are barred as they relate to time periods prior to March 5, 2007. Indeed, other than the termination of her employment, the Counterclaims makes clear that all of the actions Struthers claims in support of her FEHA claim occurring "during calendar year 2006" ("the 2006 Alleged FEHA Conduct"). (Counterclaim, ¶40). Hence, these claims are time-barred.[3]

[3] As to Struthers' claim that she timely filed a complaint with FEHA in December 2006, but that FEHA somehow did not docket it, the Panel should reject such an allegation. First, Struthers has not produced a copy of such a complaint. Second, even if she did, it is inexplicable why she

ii. **Struthers' Sexual Harassment Claim Fails For Other Reasons**

Struthers' sexual harassment claims fails for additional, independent reasons. As detailed in the December 6, 2006 letter Nies sent to Struthers, Struthers never complained to anyone in management about purported sexual harassment until her October 31, 2006 letter. As noted above, the Firm investigated the allegations and found no merit to them. Under such circumstances, the Firm cannot be held liable for purported sexual harassment. Indeed, under FEHA section 12940(j)(1), an employer may be liable for harassment by a coworker only if it "knows or should have known" of such conduct and fails to take "immediate and appropriate corrective action." Here, Struthers cannot demonstrate that the underlying alleged harassment occurred, let alone that UBSFS had knowledge of it and failed to take appropriate action.

iii. **Struthers' Retaliation Claims Fail For Other Reasons**

"To establish a prima facie case of retaliation, a plaintiff must show that she engaged in protected activity, that she was thereafter subjected to adverse employment action by her employer, and there was a causal link between the two." Morgan v. The Regents of the University of California, 88 Cal.App.4th 52, 69 (2000). The causal link is demonstrated by showing that "the adverse action followed within a relatively short time' after the protected activity. Ibid.

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would wait (as she claims she did) until February 25, 2008 – more than one year later—to follow up on the status of the complaint she claims to have filed. Additionally, any allegation that these time-barred allegations are saved as "continuing violations" is meritless. Under the continuing violations doctrine an employee may only rely on employer actions which occurred outside of the statute of limitations if (1) they are similar to the actions which occurred within the limitations period; (2) they "occurred with reasonable frequency"; and (3) they "have not acquired a degree of permanence." Richards v. CH2M Hill, Inc., 26 Cal.4th 798, 823 (2001). Here, the 2006 Alleged FEHA Conduct involves a variety of separate and unconnected incidents and is substantially different from the type of conduct that she claims occurred within the limitations period, namely her May 2007 termination. Accordingly, Struthers cannot rely upon the continuing violations theory to advance the 2006 Alleged FEHA Conduct.

In addition to being time barred (except for her retaliatory discharge claim), Struthers' retaliation claim fails for two additional reasons: (1) other than her termination, she has not identified an adverse employment action sufficient to state a claim; and (2) she cannot establish the requisite causal connection between her complaints on October 31, 2006 and November 6, 2006 and the alleged adverse employment actions, including her termination.

An adverse employment action, other than discharge or refusal to hire, is proscribed only if it alters the employee's compensation, terms, conditions, or privileges of employment, deprives her of employment opportunities or adversely affects her status as an employee. See Akers v. County of San Diego, 95 Cal.App.4th 1441, 1454-1457 (2002). Indeed, an "adverse employment action" is a "substantial" or "material" adverse change in the terms and conditions of the plaintiff's employment, not merely a change that was "contrary to the employee's interests or not to the employee's liking...." Id. at 1455; Thomas v. Department of Corrections, 77 Cal.App.4th 507, 510-511 (2000).

1. **Adverse Employment Action**

Other than Struthers' retaliatory discharge claim, Struthers' retaliation claim fails because she did not suffer an adverse employment action as a result of her complaints in October and November 2006. Struthers alleges that the following claimed acts of Ferner constitute adverse employment actions: (i) disclosing Struthers' medical condition to the CSA that was assigned to Struthers, (ii) "defaming" her to unnamed third parties, and (iii) "repeatedly insisting that she report to work by certain specific dates." (Counterclaim, Third Cause of Action). These purported actions, however, do not remotely approach a "substantial" or "material" adverse change in the terms and conditions of Struthers' employment sufficient to rise to the level of an adverse employment action.

**2. Causal Connection**

Struthers' retaliation claim also fails because she cannot demonstrate that UBSFS took any material, adverse employment action against her because of any complaints she made. To the contrary, there is a plethora of documentary evidence demonstrating that the Firm attempted to work with Struthers throughout her employment by accommodating her by providing her with leave. Indeed, in the approximately fifteen months Struthers was employed with the Firm, UBSFS gave her more than nine months of leave. Even after giving Struthers this leave, however, she still did not return to work or follow Firm policy respecting continued absences—two recurring facts that occurred throughout her employment. It was these facts—and nothing more—that resulted in Struthers' dismissal. Even then, however, the Firm was still willing to reconsider its decision to terminate Struthers' employment if she provided appropriate documentation to substantiate why she had not followed Firm policy. It was Struthers' choice—not UBSFS'—to refuse to seek such reconsideration.

Under these facts, it simply strains credulity for Struthers to allege (as she does) that UBSFS was somehow "out to get her" because of complaints she claims to have made more than six months earlier. Moreover, as Struthers herself claims in her initial Answer to the Firm's Statement of Claim that she could not perform her job duties at the time of her termination, UBSFS' termination of her employment cannot be said to have violated FEHA. See Government Code § 12940(a)(1) (making clear that FEHA "does not prohibit an employer from … discharging an employee with a physical or mental disability... where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations …") (emphasis added); Green v. State of California, 42 Cal.4th 254, 262 (2007) ("Even though section 12940 proscribes discrimination on the basis of an employee's disability, it specifically limits the reach of that proscription, excluding from coverage those persons who are not qualified, even with reasonable accommodation, to perform essential job duties....").

Finally, Struthers also cannot establish the required causal element due to the significant lapse of time between her complaints in October and November 2006 and her termination more than six months later in May 2007. As earlier noted, in order to demonstrate a causal link, Struthers must show that "the adverse action followed within 'a relatively short time' after the protected activity." Morgan, 88 Cal.App.4th at 69. Put simply, six months is not "a relatively short time" for purposes of a retaliation claim. Hence, Struthers' retaliatory discharge claim also fails on this basis.

C. **Invasion of Privacy.**

Struthers alleges Ferner disclosed her medical information to the CSA that was assigned to Struthers. (Counterclaim, ¶¶42-54). In so doing, Struthers purports to advance a claim for invasion of privacy – public disclosure of private facts. This claim, however, fails for three separate reasons. First, Ferner never made the alleged disclosure. Second, the claim, which relies upon the 2006 Alleged FEHA Conduct (see Counterclaim, ¶¶ 31, 40, 42), is barred by the one year statute of limitations applicable to invasion of privacy claims. See Code Civ. Proc., § 340(c); Belli v. Roberts Bros. Furs, 240 Cal.App.2d 284 (1st Dist. 1966). Third, and even if Ferner did make the claimed disclosure (which he did not), Struthers' claim would nevertheless still fail as a matter of law.

The elements of the tort of public disclosure of private facts are (1) public disclosure, (2) of a private fact, (3) which would be offensive and objectionable to a reasonable person. Shulman v. Group W Productions, Inc., 18 Cal.4th 200, 214 (1998). Here, Struthers' own allegation demonstrates that her claim is legally deficient as a matter of law because she cannot establish the element of public disclosure. "[C]ommon law invasion of privacy by public

2. **Causal Connection**

Struthers' retaliation claim also fails because she cannot demonstrate that UBSFS took any material, adverse employment action against her because of any complaints she made. To the contrary, there is a plethora of documentary evidence demonstrating that the Firm attempted to work with Struthers throughout her employment by accommodating her by providing her with leave. Indeed, in the approximately fifteen months Struthers was employed with the Firm, UBSFS gave her more than nine months of leave. Even after giving Struthers this leave, however, she still did not return to work or follow Firm policy respecting continued absences—two recurring facts that occurred throughout her employment. It was these facts—and nothing more—that resulted in Struthers' dismissal. Even then, however, the Firm was still willing to reconsider its decision to terminate Struthers' employment if she provided appropriate documentation to substantiate why she had not followed Firm policy. It was Struthers' choice—not UBSFS'—to refuse to seek such reconsideration.

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**D. Intentional Infliction of Emotional Distress.**

Struthers relies upon the aforementioned allegations of purported misconduct in an attempt to advance an intentional infliction of emotional distress claim. (Counterclaim, ¶¶55-60). This claim fails as a matter of law.

"The modern view respecting actionable intentional misconduct by the employer is that it must be alleged and proved that the employer acted deliberately with the specific intent to injure the employee." Arendell v. Auto Parts Club, Inc. (1994) 29 Cal.App.4th 1261, 1265 (1994). To prove intentional infliction of emotional distress the conduct must be "outrageous." Melorich Builders, Inc. v. Superior Court, 160 Cal.App.3d 931, 936 (1984). To meet this standard, Struthers must show that UBSFS' actions were "so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community." Ibid. For the reasons already stated, and the fact that, as demonstrated above, the Firm attempted to work with Struthers numerous times before she abandoned her employment, Struthers cannot remotely satisfy the stringent standard applicable to emotional distress claims.

**E. Covenant of Good Faith and Fair Dealing.**

Struthers attempts to "re-package" her preceding claims in the form of a breach of the implied covenant and fair dealing claim. This attempt, however, fails as a matter of law.

As set forth above, Struthers' acknowledged in the LOU and in signing her Employee Handbook Acknowledgement Form, that she was an at-will employee. She also acknowledged this fact in the Promissory Note she signed in connection with her receiving the EFL. Under such circumstances, she cannot state a claim for breach of an implied covenant of good faith and fair dealing. Indeed, an express agreement for at-will employment, precludes both a claim for breach of implied contract and breach of the implied covenant of good faith and fair dealing. See Agosta v. Astor, 120 Cal.App.4th 596, 604, 607-608 (2004); Starzynski v. Capital Public Radio, Inc., 88 Cal.App.4th 33, 38-39 (2001); Guz v. Bechtel National, Inc., 24 Cal.4th 317, 340 & fn. 10, 350-352 (2000).

F. **Partial Rescission.**

Struthers seeks to "partially rescind" the EFL on grounds that she was under "economic duress" when she agreed to its provision. (Counterclaim, ¶¶64-68). Struthers alleges she was not presented with the EFL until after she had resigned from Morgan Stanley and, therefore, had "no choice" but to sign the EFL. Struthers' claim, however, fails because the uncontroverted facts show that she did not resign from Morgan Stanley until February 16, 2006 and that UBSFS was presented with the LOU and accompanying EFL for her review on February 6, 2006. (Exhibits A at ¶2, J at p. 2 and R). Thus, Struthers cannot credibly contend that she was subjected to any kind of "duress" when she signed the EFL. She could have decided to reject UBSFS' employment offer (and the attendant EFL) and remain at Morgan Stanley. Instead, she chose to accept the EFL and now, through her Counterclaim, seeks to "have her cake and eat it too." That is, Struthers seeks to rescind only the portion of the EFL she finds undesirable – the obligation that she repay the unforgiven amounts to UBSFS.

G. **Preventing Employment by Misrepresentation.**

Section 1050 of the California Labor Code provides: "Any person, or agent or officer thereof, who, after having discharged an employee from the service of such person or after an employee has voluntarily left such service, by any misrepresentation prevents or attempts to prevent the former employee from obtaining employment, is guilty of a misdemeanor."

Cal.Lab.Code § 1050. A civil action to enforce this section is created by Labor Code section 1054, which provides that "any person or agent or officer thereof, who violates any provision of sections 1050 to 1052, inclusive, is liable to the party aggrieved, in a civil action, for treble damages." Id. § 1054.

Struthers alleges UBSFS violated Labor Code Section 1050 by publicly misrepresenting to some unknown third party at the time the Firm terminated her employment the reason for such termination. (Counterclaim, ¶¶37, 69-72). She alleges this purported public disclosure "prevented her from obtaining employment as a broker or the equivalent in the securities industry…." (Counterclaim, ¶70). Struthers' claim fails for two reasons. First, UBSFS never made any misrepresentations (let alone "public misrepresentations") about the termination of Struthers' employment. Second, even if UBSFS did make such a disclosure (and it did not), Struthers herself has stated in her initial Answer in this matter that she is unable to work because of her medical condition, not because of some unspecified public disclosure she believes UBSFS has made. Thus, even if Struthers could show that a misrepresentation was made, her own admission precludes recovery on this claim because she cannot show that the supposed misrepresentation prevented her from working.[4]

## V. SEPARATE DEFENSES

### First Defense

Struthers' allegations fail to state a claim upon which relief may be granted.

### Second Defense

Struthers' claims are barred by the doctrines of laches, waiver, accord and satisfaction, lack of standing, release, assumption of the risk, ratification, and estoppel.

[4] To the extent Ms. Struthers relies upon UBSFS' required Form U-5 disclosure in support of her claim, her reliance fails as a matter of law because Form U-5 statements are absolutely privileged. See Fontani v. Wells Fargo Investments, LLC, 129 Cal. App. 4th 719 (2005) (holding Form U-5 statements are protected by absolute privilege).

**Third Defense**

Struthers' claims are barred because the applicable administrative procedures and conditions precedent were not properly effectuated or complied with prior to the commencement of this action.

**Fourth Defense**

Struthers had the opportunity and means to mitigate her damages, but failed to do so in an appropriate and reasonable manner.

**Fifth Defense**

Struthers' alleged losses were not proximately caused by any alleged misconduct of UBSFS.

**Sixth Defense**

Struthers' claims are barred, in whole or in part, by the applicable statute(s) of limitations.

**Seventh Defense**

Recovery based on any alleged employment agreement, to the extent it relies on any oral statement(s), is barred by the statute of frauds.

**Eighth Defense**

Struthers' claims are barred, in whole or in part, by the Letter of Understanding.

**Ninth Defense**

Struthers cannot recover attorneys' fees or punitive damages or exemplary damages under applicable law.

**Tenth Defense**

Struthers' claims are barred, in whole or in part, by the After-Acquired Evidence Doctrine.

**Eleventh Defense**

Assuming an oral agreement of employment existed between UBSFS and Struthers, which UBSFS denies, any failure by UBSFS to perform any obligations resulted from Struthers' failure to perform her own obligations as required by the terms of that alleged agreement, and the performance on Struthers' part of her own obligations was a condition precedent to or concurrent with the performance of UBSFS' obligations.

**Twelfth Defense**

Struthers' claims are barred, in whole or in part, by California Civil Code section 1692.

**WHEREFORE**, UBSFS respectfully requests that this action be dismissed and that Struthers have and recover nothing of UBSFS, that the costs of this arbitration be taxed to Struthers, and that the Panel enter such other and further relief as may be just and proper, including but not limited to the relief UBSFS seeks in its Statement of Claim in the above-captioned matter.

Dated: Weehawken, New Jersey
May 30, 2008

Respectfully submitted,

UBS FINANCIAL SERVICES INC.

By: [signature]

Stephen D. Bird, Esq.
UBS Financial Services Inc.
1200 Harbor Boulevard, 10th Floor
Weehawken, New Jersey 07086
Tel: (201) 352-8439
Fax: (201) 352-7291

Of Counsel:

Amy R. Melner, Esq.
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Tel. (213) 253-5334
Fax. (213) 253-5469

*Gail Struthers v. UBS Financial Services, Inc.*
United States District Court - CASE NO. 08cv1381 H (JMA)

Judge Marilyn L. Huff

Courtroom 13

**DEFENDANT UBS FINANCIAL SERVICES INC.'S NOTICE OF MOTION AND MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATIONS OF JENNIFER NIES AND STEPHEN D. BIRD IN SUPPORT OF THEREOF**

# EXHIBIT "11"

CSC.

CORPORATION SERVICE COMPANY

ELW

Stephen Bird

LDD / ALL
Transmittal Number: 5877778
Date Processed: 07/01/2008

# Notice of Service of Process

**Primary Contact:** Mercinth Pearce
UBS Financial Services Inc.
1200 Harbor Boulevard
Floor 10TH
Weehawken, NJ 07086

| | |
|---|---|
| **Entity:** | UBS Financial Services Inc.<br>Entity ID Number 1707190 |
| **Entity Served:** | UBS Financial Services, Inc. |
| **Title of Action:** | Gail Struthers vs. USB Financial Services, Inc. |
| **Document(s) Type:** | Summons and Amended Complaint |
| **Nature of Action:** | Other |
| **Court:** | San Diego Superior Court, California |
| **Case Number:** | 37-2008-00079382-CU-BT-CTL |
| **Jurisdiction Served:** | California |
| **Date Served on CSC:** | 07/01/2008 |
| **Answer or Appearance Due:** | 30 Days |
| **Originally Served On:** | CSC |
| **How Served:** | Personal Service |
| **Plaintiff's Attorney:** | David E. Rosenbaum<br>626-432-7422 |

**Notes:** Some pages of original document are smudged and blurry.

Information contained on this transmittal form is for record keeping, notification and forwarding the attached document(s). It does not constitute a legal opinion. The recipient is responsible for interpreting the documents and taking appropriate action.

**To avoid potential delay, please do not send your response to CSC**

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2711 Centerville Road Wilmington, DE 19808 (888) 690-2882 | sop@cscinfo.com

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COPY

SUM-100

# SUMMONS ON AMENDED COMPLAINT
## (CITACION JUDICIAL)

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

FILED
CIVIL BUSINESS OFFICE 5

2008 JUN 30 P 3:57

CLERK-SUPERIOR COURT
SAN DIEGO COUNTY, CA

NOTICE TO DEFENDANT:
(AVISO AL DEMANDADO):

UBS FINANCIAL SERVICES, INC., a corporation; and DOES 1 through 20, inclusive

YOU ARE BEING SUED BY PLAINTIFF:
(LO ESTÁ DEMANDANDO EL DEMANDANTE):

GAIL STRUTHERS

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (www.lawhelpcalifornia.org), the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), or by contacting your local court or county bar association.

*Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (www.courtinfo.ca.gov/selfhelp/espanol/), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.*

*Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California, (www.courtinfo.ca.gov/selfhelp/espanol/) o poniéndose en contacto con la corte o el colegio de abogados locales.*

The name and address of the court is:
*(El nombre y dirección de la corte es):*

CASE NUMBER (Número del Caso): 37-2008-00079382-CU-BT-CTL

220 West Broadway, San Diego, California 92101

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:
*(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):*

David E. Rosenbaum Bar #49735
484 So. Euclid Ave #105 (626)-432-7422
Pasadena, CA 91101

DATE: JUNE 30, 2008 (Fecha) JUN 3 0 2008

Clerk, by (Secretario) R. Vela, Deputy (Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)
*(Para prueba de entrega de esta citatión use el formulario Proof of Service of Summons, (POS-010)).*

[SEAL]

NOTICE TO THE PERSON SERVED: You are served
1. [ ] as an individual defendant.
2. [ ] as the person sued under the fictitious name of (specify):
3. [X] on behalf of (specify): USB FINANCIAL SERVICES, INC. A CALIFORNIA CORPORATION
under: [X] CCP 416.10 (corporation) [ ] CCP 416.60 (minor)
[ ] CCP 416.20 (defunct corporation) [ ] CCP 416.70 (conservatee)
[ ] CCP 416.40 (association or partnership) [ ] CCP 416.90 (authorized person)
[ ] other (specify):
4. [X] by personal delivery on (date): ( JULY 08

Page 1 of 1

Form Adopted for Mandatory Use
Judicial Council of California
SUM-100 [Rev. January 1, 2004]

SUMMONS

Code of Civil Procedure §§ 412.20, 465

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David E. Rosenbaum STATE BAR NO. 49735
484 So. Euclid Avenue, Suite 105
Pasadena, California 91101
Telephone: (626) 432-7422
FAX: (626) 792-5433

Attorney for Plaintiff
GAIL STRUTHERS

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**COUNTY OF SAN DIEGO, CENTRAL [HALL OF JUSTICE] DIVISION**

| | |
|---|---|
| GAIL STRUTHERS, an individual,<br><br>Plaintiff,<br><br>vs.<br><br>UBS FINANCIAL SERVICES, INC., a corporation; and DOES 1 through 10, inclusive,<br><br>Defendants. | Case No. 37-2008-00079382-CU-BT-CTL<br>[Assigned to The Hon. Jeffrey B. Barton, Dept. C-69]<br><br>**FIRST AMENDED COMPLAINT FOR:**<br><br>**(1) INTENTIONAL MISREPRESENTATION**<br>**(2) NEGLIGENT MISREPRESENTATION**<br>**(3) VIOLATION OF PLAINTIFF'S RIGHTS UNDER THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING LAW**<br>**(4) INVASION OF PRIVACY**<br>**(5) INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS**<br>**(6) BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING**<br>**(7) PARTIAL RESCISSION**<br>**(8) UNLAWFULLY PREVENTING EMPLOYMENT BY MISREPRESENTATION**<br><br>[*Civil Code* §§ 1572, 1709, 1710, 1689, 3294, & 3343; *Code of Civil Procedure* §1281.2; *Government Code* §§ 12900 et seq.; *Labor Code* §§ 1050, 1053, 1054] |

Plaintiff, for her First Amended Complaint, alleges:

## GENERAL ALLEGATIONS

1. Plaintiff, GAIL STRUTHERS, is an individual who resides and at times relevant hereto resided in the State of California, County of San Diego, and City of San Diego.

2. Defendant, UBS FINANCIAL SERVICES, INC. ("UBS," not in italics), is and at all times relevant herein was, a corporation organized under the laws of the State of Delaware, which does business in the State of California and has a principal place of business in the County of San Diego.

3. Plaintiff does not know the true names and capacities, whether individual, corporate, or otherwise, of the Defendants designated herein as DOES 1 through 10 at this time and sues said defendants herein under fictitious names. Each of them is a resident of and/or transacts business in California. Plaintiff will amend this complaint to show the true names and capacities of said DOES when ascertained. Plaintiff is informed and believes and based thereon alleges that each of the DOES is indebted to plaintiff as hereinafter alleged, and that plaintiff's rights against such fictitiously named Defendants arise from such indebtedness. All references in this pleading to UBS shall include these fictitiously named Doe Defendants.

4. With respect to each allegation contained herein that plaintiff alleges on information and belief, said allegation is likely to have evidentiary support after Plaintiff is given a reasonable opportunity for further investigation and discovery.

5. Plaintiff is informed and believes and on that basis alleges that each of Defendants DOES 1 through 10 was the agent, partner, servant and/or employee of each of the other Defendants, and acted or failed to act as herein alleged in the course and scope of said agency, authority, partnership, and/or employment.

## FIRST CAUSE OF ACTION

**(Intentional Misrepresentation)**

**(As Against All Defendants)**

6. Plaintiff incorporates herein by this reference paragraphs 1 through 5, above,

and re-alleges them as if fully set forth herein.

7. Before March 7, 2006, plaintiff was a securities broker employed at Morgan Stanley, with $55 million in assets under management. Plaintiff was generating approximately $529,000 per year in revenue, from which her take-home compensation was over $300,000 per year, plus benefits and pension & 401-K contributions. She was the No. 1 revenue-producing broker for her years of experience in Morgan Stanley, and, in that capacity, spoke at Morgan Stanley's annual national conference in 2005.

8. To induce plaintiff to resign from Morgan Stanley and become employed by UBS, Toby Ferner ("Ferner"), an agent of UBS, made material representations to her. These representations included, but were not limited to, the following:

a. That UBS would accommodate plaintiff's occasional extended need to work and place customers' orders by computer from her home; and

b. That UBS would pay plaintiff the equivalent of her then-gross commissions (approximately $529,000) – $396,717.00 in cash and $132,239 in stock – in exchange for her agreement to a promissory note ("Note") as to the $396,717.00 in cash, which Note would be forgiven in annual installments over a six-year period of employment. As a matter of English usage, the representation that plaintiff would have to sign such Note did not connote, mean or otherwise indicate that said Note would contain provisions (i) that plaintiff had to submit all employment disputes to binding arbitration and (ii) that UBS could terminate her employment at any time with or without cause.

9. Plaintiff is informed and believes and based thereon alleges as follows: At the time of said representations UBS knew that the said Note would contain provisions (i) requiring that plaintiff submit all employment disputes to compulsory and binding arbitration, thereby waiving her right to a jury trial under the California Constitution, (ii) that plaintiff was on 'at will' employee subject to discharge at UBS's will, and (iii) other terms and conditions that did not relate to the Note or the repayment of said Note. Before and during the events in question herein, UBS customarily used one or more

boilerplate promissory note forms that contained such arbitration and "at will" provisions in connection with the hiring of other individuals.

10. UBS failed to reveal and suppressed the information described in ¶ 9, above. The suppression of this information was likely to and did mislead plaintiff in resigning from her employment with Moran Stanley and accepting employment with UBS.

11. In the alternative, UBS made the representations referred to in ¶ 8 in absolute and unqualified terms, thereby communicating to plaintiff that UBS knew such representations to be true, when in fact UBS did not know whether such representations were true or false.

12. In the alternative, when UBS made such representations to plaintiff, UBS was duty bound to speak the whole truth known to it concerning such matters in that:

a. UBS had exclusive knowledge of material facts not known to plaintiff and knew that such facts were unknown to plaintiff or were beyond her reach;

b. UBS as the prospective employer had a fiduciary or quasi-fiduciary duty of disclosure to a prospective employee under the circumstances; and/or

c. UBS had the duty to be truthful and the failure to disclose facts which materially qualify those stated is the telling of a half-truth.

13. The aforesaid representations were material in that each and all of them were matters that would influence a reasonable person's decision to resign from employment and accept employment with a new employer in the circumstances. In the alternative, they were matters that plaintiff was likely to regard as important in making such decisions. Had plaintiff known the true facts, she would not have resigned from her employment at Morgan Stanley, would not have accepted employment with UBS, and would not have signed the Note containing the arbitration agreement.

14. UBS knew that the above representations, including but not limited to those alleged in subparagraphs 8a and 8b, were false. As to the representations referred to in subparagraph 8a, Mr. Ferner at the time of his representation had no intention to permit plaintiff to place customer orders from her home computer. As to the

representations referred to in subparagraph 8b, UBS knew these were false for the reasons stated in ¶¶ 9 and 10 and, alternatively, in ¶¶ 11-13.

15. UBS intended that plaintiff would rely on said representations and would resign from her employment with Morgan Stanley and become employed by UBS.

16. Plaintiff justifiably relied on said representations and the absence of the above described omitted information in resigning from her employment with Moran Stanley and accepting employment with UBS.

17. Unknown to plaintiff at the time, said representations were false. Had she known the true facts, she would not have resigned from her employment with Morgan Stanley, would not have accepted employment with UBS, and would not have signed the Note containing the arbitration agreement.

18. Upon plaintiff's employment with UBS, she was required to sign a Note that contained the unrelated provisions described in ¶ 9 above. UBS refused to accommodate her occasional extended need to work and place customers' orders by computer from her home. UBS failed to comply with numerous other working conditions that it had represented would apply to plaintiff.

19. As a proximate result of the foregoing, plaintiff has suffered damages in a monetary amount to be proven at trial.

20. Based on the foregoing, UBS's aforementioned conduct constituted willful and intentional misrepresentations, deceit, or concealment of material facts known to Defendants within the meaning of *Civil Code* §1572. In addition, UBS engaged in said conduct maliciously in that it did so in conscious disregard of plaintiff's rights. Accordingly, Defendant's conduct justifies an award of exemplary and punitive damages under *Civil Code* §3294.

**SECOND CAUSE OF ACTION**

**(Negligent Misrepresentation)**

**(As Against All Defendants)**

21. Plaintiff incorporates herein by this reference paragraphs 1 through 5, 7

through 13, and 15 through 19 above, and re-alleges them as if fully set forth herein.

22. When UBS made the said representations, it had no reasonable grounds for believing them to be true.

**THIRD CAUSE OF ACTION**

**(For Violation of Plaintiff's Rights Under the Fair Employment and Housing Law)**

**(As Against All Defendants)**

23. Plaintiff incorporates herein by this reference paragraphs 1 through 5, and 7 through 9 above, and re-alleges them as if fully set forth herein.

24. During plaintiff's employment at Morgan Stanley, she became acquainted with Mr. Toby Ferner (herein, "Ferner"), another broker employed by Morgan Stanley.

25. Ferner left the employment of Morgan Stanley to become the manager of UBS's Carlsbad, California office. At all times mentioned herein, Ferner was Vice President and Branch Manager of UBS's Carlsbad, California office.

26. In 2006, Ferner approached plaintiff with a proposal that she move from Morgan Stanley to UBS.

27. At all times during her career with Morgan Stanley, plaintiff had and still has a mental disability, commonly known as 'bi-polar disorder.' That disability is controllable with medication that plaintiff takes and posed no difficulty at Morgan Stanley, where plaintiff was permitted to work from her home when necessary either because of the bi-polar disorder or because plaintiff has children that she must care for.

28. Before becoming employed by UBS, plaintiff informed Ferner of the bi-polar disorder and of her occasional need to work from home due to it and due to her children. Plaintiff further informed Ferner that, for these reasons, plaintiff would occasionally need to work and place customers' orders from her home. In the course of dealings that led to her employment with UBS, Ferner represented that UBS would accommodate plaintiff's said need to work and place customers' orders from her home.

29. On or about March 7, 2006, the plaintiff commenced employment with UBS as a financial advisor in its Carlsbad, California office.

30. Approximately simultaneous with plaintiff's commencement of employment, UBS also hired a financial advisor whose first name is Mike, but whose full name and location are currently unknown to plaintiff.

31. In or about the spring and early summer of 2006, Mike engaged a course of sexual harassment of plaintiff and other female employees in UBS's Carlsbad, California office. Mike engaged in said harassment with the actual and constructive knowledge and consent of Defendant UBS.

32. Mike's sexual harassment of the plaintiff consisted of sexual advances and demands, sexual assault, and sexually degrading remarks to plaintiff. Mike engaged in similar conduct with respect to other women in UBS's Carlsbad, California office.

33. Within approximately one month after being hired, plaintiff began complaining to Ferner about the above sexual harassment of plaintiff and other female employees in UBS's Carlsbad, California office. Ferner took no action with respect to Mike's sexual harassment and, when plaintiff complained that Mike sexually assaulted her, Ferber stated that plaintiff could "take it" or could "take care of [herself]" or words to that effect.

34. In retaliation for plaintiff's complaints about Mike's sexual harassment, Ferner on behalf of UBS took numerous actions against plaintiff which eventually resulted in an environment in the Carlsbad office that was so hostile to plaintiff that plaintiff was unable to continue working in that office. These included, but are not limited to the following: Ferner violated plaintiff's medical privacy, both within the office and outside. Disclosures concerning plaintiff's medical condition were made to plaintiff's Sales Assistant. In addition, UBS disclosed a series of adverse communications about plaintiff's personnel status to her Sales Assistant who then sent them to plaintiff. The said violations of privacy as to plaintiff's Sales Assistant not only made it impossible for plaintiff to work with the Sales Assistant, but also subjected plaintiff to humiliation and ridicule, and caused plaintiff to become a virtual pariah among the staff that plaintiff depended on. In addition, Ferner made defamatory statements about plaintiff to people in other securities firms, and to at least one of plaintiff's customers. On information and

belief, plaintiff further alleges that Ferner made defamatory innuendos about her to others. When plaintiff asked that Ferner honor the agreement that UBS would accommodate her need to work and place orders from her home Ferner refused. This refusal continued even after plaintiff's doctor sent UBS a letter in September 2006 stating that due to plaintiff's medical disability and the environment in the Carlsbad office, she needed to work from home. Another example of the retaliation was that Ferner began dealing directly with plaintiff's customers and attempted to persuade them to switch their accounts to Ferner or to other brokers in the office.

35. As a result of the foregoing and other wrongful conduct by Ferner and UBS, plaintiff entered treatment and continues to be treated for mental disability due to the foregoing events. On or about October 31, 2006, plaintiff wrote to Ferner (i) describing the foregoing and other intolerable working conditions and UBS's numerous breaches of agreements, (ii) informing him that these matters had caused plaintiff to suffer mental disability and (iii) that plaintiff's physician had advised that she was not to return to work under the existing working conditions. Despite the October 31, 2006 letter and Ferner's knowledge that the medical disability prevented plaintiff from reporting for work in his office, Ferner continued to retaliate against plaintiff by repeatedly insisting that she report to work by certain specific dates. This continued even after plaintiff's physician submitted a letter from my doctor advising that plaintiff was disabled and unable to report for work.

36. Ultimately, plaintiff was placed on leave status and continued in that status from January 2007 through mid-May 2007. UBS provided plaintiff no documentation as to the leave status or its length or expiration date. There was no communication between plaintiff and UBS during the period of January 2007 through mid-May 2007.

37. From January 2007 through May 2007 and thereafter continuing to this date, plaintiff has been under treatment for mental disability by her physician and mental health professionals, including psychiatrists. Plaintiff's mental disability increased in severity to the point that she was hospitalized from May 11 through May 17, 2007.

38. During that hospitalization, UBS on May 14, 2007, wrote to plaintiff stating that her medical leave had expired on May 1, 2007, that she was required to report for work in Ferner's office on that date, that she failed to report, and that, as a result, she was being discharged from UBS's employment, effective May 15, 2007.

39. By this reference, plaintiff incorporates the allegations contained in ¶ 8, subparagraph 8b, and ¶ 9 as if set forth fully herein. On May 25, 2007, UBS made written demand that plaintiff repay the unforgiven balance of that Note, despite a provision that the Note would be forgiven if UBS discharged plaintiff due to disability. In addition, due to the discharge, plaintiff forfeited the $132,239 in stock.

40. Plaintiff is informed and believes and based thereon alleges that at approximately the same time as the above-described termination of her employment, UBS publicly disclosed that her employment had been terminated. Said public disclosure was not in response to any special request for such information. In the circumstances, said public disclosure contained a false representation that plaintiff's employment was terminated for wrongdoing.

41. UBS, by its aforesaid conduct, has violated plaintiff's rights under the California Fair Employment and Housing Act, *Government Code* §§ 12900 et seq.

42. As a direct and proximate result of UBS's conduct, plaintiff has suffered damage in an amount to be proved at trial. Among other things, UBS's above conduct has caused Plaintiff to suffer emotional distress, humiliation, and mental anguish and has prevented and will in the future prevent plaintiff from obtaining employment in the securities industry for the remainder of her career.

43. As alleged in the original Complaint, ¶39, Plaintiff has filed more than one charge of discrimination with the California Department of Fair Employment and Housing. On December 11, 2006, based on advice and instructions from her then-attorney, Plaintiff tendered for filing by U. S. Mail a charge of discrimination based on the above actions that UBS engaged in during calendar year 2006. Plaintiff is informed and believes and based thereon alleges that said charge was properly addressed, with

postage fully prepaid, and arrived at the San Diego office of the California Department of Fair Employment and Housing ["DFEH"], but was not docketed or processed through the oversight of the DFEH. By the time that a right to sue letter would have been received from the DFEH, had the charge been properly handled at the DFEH, Plaintiff was without legal representation and unable to comprehend the situation or the consequence of receiving no right to sue letter due to the disability caused and/or exacerbated by UBS. Plaintiff did not become aware of the non-docketing of said December 2006 charge until on or about February 25, 2008.

44. On or about March 5, 2008, Plaintiff filed her second charge of discrimination against UBS with the DFEH, this time through counsel, utilizing the DFEH Internet-based, automated charge filing system. The second charge is based on all wrongful conduct of UBS, including the continuing violations that began in 2006 and continued through portions of calendar year 2007; such has her termination and UBS's demand that she repay the above-described loan in May 2007. A true and correct copy of the right to sue letter obtained as to the second charge is attached hereto as Exhibit 1.

**FOURTH CAUSE OF ACTION**

**(Invasion of Privacy)**

**(As Against All Defendants)**

45. Plaintiff incorporates herein by this reference paragraphs 1 through 5, 7 and 24 through 38 and 40 above, and re-alleges them as if fully set forth herein.

46. Plaintiff had a reasonable expectation of privacy in the medical information she disclosed to Mr. Ferner and to UBS.

47. Plaintiff had an expectation of privacy in the personnel information generated and maintained by Mr. Ferner and UBS as to her employment at UBS.

48. UBS's disclosures of private information concerning plaintiff's medical disability and personnel matters violated plaintiff's privacy.

49. The disclosures by defendant were public disclosures.

50. The facts so disclosed were private facts that plaintiff desired to keep private.

51. The disclosure by defendant of the above facts would be highly offensive to a reasonable person in plaintiff's position.

52. UBS knew, or acted with reckless disregard of the fact, that a reasonable person in Struthers' position would consider said public disclosure highly offensive.

53. The said information did not have a substantial connection to a matter of legitimate public concern.

54. Plaintiff was harmed in that she was scorned and abandoned by her business associates, exposed to contempt and ridicule, and suffered loss of reputation and standing in the community.

55. In addition, plaintiff has suffered injury to her business and employment in an amount according to proof. Among other things, UBS's public disclosure of plaintiff's termination has prevented and will in the future prevent plaintiff from obtaining employment in the securities industry for the remainder of her career.

56. UBS's above conduct was a substantial factor in causing plaintiff's harm.

57. In making said disclosures, UBS was guilty of oppression and malice. UBS engaged in said conduct in conscious disregard of plaintiff's rights, and in violation of *Civil Code* §§1709 and 3343. Plaintiff therefore seeks an award of exemplary damages pursuant to *Civil Code* §3294.

**FIFTH CAUSE OF ACTION**

**(Intentional Infliction of Emotional Distress)**

**(As Against All Defendants)**

58. Plaintiff incorporates herein by this reference paragraphs 1 through 5, 7, 8a, 24 through 38, 40, 46, 47, and 49 through 56 above, and re-alleges them as if fully set forth herein.

59. The actions of UBS were outrageous.

60. UBS intended to cause plaintiff emotional distress or were performed with reckless disregard of the probability that plaintiff would severe emotional distress.

61. Plaintiff has suffered emotional damage. Among other things, plaintiff has

been unable to work and will be unable to work in her profession and occupation.

62. UBS's aforementioned outrageous conduct was a substantial factor in causing plaintiff emotional distress and resulting damages in an amount to be proved at trial.

63. In doing the acts herein alleged, UBS acted knowingly, intentionally, and maliciously in that UBS engaged in said conduct in conscious disregard of plaintiff's rights. Plaintiff therefore seeks an award of punitive and exemplary damages under *Civil Code* §3294.

**SIXTH CAUSE OF ACTION**

**(Breach of the Implied Covenant of Good Faith and Fair Dealing)**

**(As Against All Defendants)**

64. Plaintiff incorporates herein by this reference ¶ 1 through 5, 7, 24 through 40, 46, 47, and 49 through 56 above, and re-alleges them as if fully set forth herein.

65. By its aforesaid conduct, UBS breached the implied covenant of good faith and fair dealing of its contract with plaintiff.

66. As a proximate result of the aforementioned conduct, plaintiff has suffered damages in an amount be proved at trial.

**SEVENTH CAUSE OF ACTION**

**(Partial Rescission)**

**(As Against All Defendants)**

67. Plaintiff incorporates herein by this reference paragraphs 1 through 5 and 7 through 18 above, and re-alleges them as if fully set forth herein.

68. As alleged above, UBS concealed, suppressed, and failed to disclose the material terms of the Note until after she had resigned from her employment with Morgan Stanley. As a condition of employing her, UBS for the first time presented her with a Note that contained provisions that went far beyond what UBS had represented the Note was to contain. Said undisclosed terms included provisions for compulsory arbitration of employment disputes and for 'at will' employment status.

69. When UBS presented plaintiff with said Note, after she had resigned from her

employment with Morgan Stanley, plaintiff had no alternative other than to agree to and execute them.

70. Based on the foregoing, plaintiff's apparent consents to compulsory arbitration of all employment disputes, the 'at will' employment agreement, and all provisions contained in the UBS Note other than the terms of the Note and forgiveness thereof were not real, mutual, or free in that they were obtained through deceit and economic duress.

**NOTICE OF RESCISSION AND DEMAND FOR RETURN OF CONSIDERATION:**

71. With respect to each of the above grounds for partial rescission, plaintiff would not have consented to the above portions of the Note had it not been for the circumstances alleged above. Accordingly, plaintiff is entitled to rescind those portions of the written contract. Since neither party has given consideration for those portions of the Note, there is no consideration to be returned.

72. As a result of the foregoing, all portions of the Note other than the terms of the loan, payment, and forgiveness of the amount due should be rescinded.

**DEMAND FOR DAMAGES:**

35. Etess also intends service of this complaint to serve as a demand against Curran under *Civil Code* §1692 for consequential damages caused by UBS's conduct, in an amount to be proved at trial.

36. Based on the facts alleged in the above paragraphs, UBS's aforementioned conduct constituted willful and intentional misrepresentations, deceit, and concealment of material facts known to UBS. In addition, UBS's conduct constituted malice in that it was carried on by UBS with a willful and conscious disregard of plaintiff's rights. Accordingly, UBS's conduct justifies an award of exemplary and punitive damages under *Civil Code* §3294.

**EIGHTH CAUSE OF ACTION**

**(Unlawfully Preventing Employment by Misrepresentation)**

**(As Against All Defendants)**

73. Plaintiff incorporates herein by this reference paragraphs 1 through 5, 7, 24 through 38, and 40, and re-alleges them as if fully set forth herein.

74. As a proximate result of the public disclosure of UBS's termination of plaintiff's employment, without any special request for such disclosure, plaintiff has been prevented from obtaining employment as a broker or the equivalent in the securities industry for the remainder of her working life, to plaintiff's damage in an amount to be proven at trial.

75. Said public disclosure violated *Labor Code* §§ 1050 and 1053. Accordingly, plaintiff is entitled to treble damages as provided in *Labor Code* § 1054.

76. Said public disclosure constituted willful and intentional misrepresentation, deceit, and concealment of material facts known to UBS within the meaning of *Civil Code* §1572. In addition, UBS engaged in said conduct maliciously in that it did so with a willful and conscious disregard of Plaintiff's rights. Accordingly, UBS conduct justifies an award of exemplary and punitive damages under *Civil Code* §3294.

**ALLEGATIONS CONCERNING THE COURT'S JURISDICTION TO DETERMINE THE ARBITRABILITY OF THIS ACTION**

77. UBS's misrepresentation and deceit, as alleged in ¶¶ 7-18 above, not only go to the inducement of the contract, but also specifically caused plaintiff to execute of the arbitration agreement.

78. Plaintiff's duress, as alleged in ¶¶ 68-72 above, specifically caused plaintiff to execute the arbitration agreement.

79. Under both the *Federal Arbitration Act* and California Supreme Court law, where a party's fraud or duress goes to the making of the arbitration agreement, this court has jurisdiction under *Code of Civil Procedure* §1281.2(b) to determine that said fraud and/or duress are "grounds for revocation" of the arbitration agreement.

80. Under *Code of Civil Procedure* §1281.2(c), this court has jurisdiction to determine that the entire controversy shall be tried before this Court.

WHEREFORE, Plaintiff for judgment as follows:

1. For compensatory damages in an amount to be proven at trial as to all causes of action;

2. With respect to the First, Third, Fourth, Fifth and Eighth Causes of Action, for punitive and exemplary damages according to proof;

3. With respect to the Eighth Cause of Action, for treble damages;

4. With respect to all causes of action:

a. For pre-judgment interest as allowed by law;

b. For attorney fees and costs as authorized by law;

c. For costs of suit herein incurred; and

d. For such other and f

DATED: June 27, 2008

David E. Rosenbaum

DAVID E. ROSENBAUM
Attorney for Plaintiff GAIL STRUTHERS

# EXHIBIT 1

# EXHIBIT 1

STATE OF CALIFORNIA - STATE AND CONSUMER SERVICES AGENCY ARNOLD SCHWARZENEGGER, Governor

**DEPARTMENT OF FAIR EMPLOYMENT & HOUSING**
1350 FRONT STREET, SUITE 3005, SAN DIEGO, CA, 92101
(619) 645-2681
www.dfeh.ca.gov

March 05, 2008

STRUTHERS, GAIL
3546 MT. EVEREST BLVD.
SAN DIEGO, CA 92111

RE: E200708D5077-00
STRUTHERS/UBS FINANCIAL SERVICES, INC.

Dear STRUTHERS, GAIL:

**NOTICE OF CASE CLOSURE**

This letter informs that the above-referenced complaint that was filed with the Department of Fair Employment and Housing (DFEH) has been closed effective March 05, 2008 because an immediate right-to-sue notice was requested. DFEH will take no further action on the complaint.

This letter is also the Right-To-Sue Notice. According to Government Code section 12965, subdivision (b), a civil action may be brought under the provisions of the Fair Employment and Housing Act against the person, employer, labor organization or employment agency named in the above-referenced complaint. The civil action must be filed within one year from the date of this letter.

If a federal notice of Right-To-Sue is wanted, the U.S. Equal Employment Opportunity Commission (EEOC) must be visited to file a complaint within 30 days of receipt of this DFEH *Notice of Case Closure* or within 300 days of the alleged discriminatory act, whichever is earlier.

DFEH does not retain case files beyond three years after a complaint is filed, unless the case is still open at the end of the three-year period.

Sincerely,

Belinda LeDoux

Belinda LeDoux
District Administrator

cc: Case File

JENNIFER NIES
ASSOCIATE DIRECTOR, CLIENT RELATIONSHIP MANAGER
UBS FINANCIAL SERVICES INC.
1000 HARBOR BLVD., 10TH FLOOR
WEEHAWKEN NJ 07086

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SHIP TO: (201) 352 9724 **BILL THIRD PARTY**

**UBS Financial Services Inc.**
**Mercinth Pearce**
**1200 Harbor Boulevard**
**Floor 10TH**
**Weehawken, NJ 07086**

**STANDARD OVERNIGHT**

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| **Tracking Number:** | 944763749317 |
| **Package Recipient:** | Mercinth Pearce |
| **Recepient Company:** | UBS Financial Services Inc. |
| **Recepient Address:** | 1200 Harbor Boulevard Floor 10TH<br>Weehawken NJ 07086 USA |
| **Phone Number:** | 2013529724 |

## Package Contents:

| Transmittal Number | Case Number | Title of Action |
|---|---|---|
| 5877778 | 37-2008-00079382-CU-BT-CTL | Gail Struthers vs. USB Financial Services, Inc. |

*Gail Struthers v. UBS Financial Services, Inc.*
United States District Court - CASE NO. 08cv1381 H (JMA)

Judge Marilyn L. Huff

Courtroom 13

**DEFENDANT UBS FINANCIAL SERVICES INC.'S NOTICE OF MOTION AND MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATIONS OF JENNIFER NIES AND STEPHEN D. BIRD IN SUPPORT OF THEREOF**

# EXHIBIT "12"

Director
Associate General Counsel
UBS Financial Services Inc.
Employment Law Unit
1200 Harbor Boulevard, 10th Floor
Weehawken, New Jersey 07086
(201) 352-8439 (telephone)
(201) 352-7291 (facsimile)
stephen.bird@ubs.com

---

**From:** David Rosenbaum [mailto:davider484@sbcglobal.net]
**Sent:** Wednesday, July 23, 2008 8:44 PM
**To:** Bird, Stephen [Legal]; rina.spiewak@finra.org
**Subject:** Notice of unavailability

From Davide R. Rosenbaum

To: Stephen D. Bird
UBS Financial Services Inc.
Employment Law Unit
1200 Harbor Boulevard, 10th Floor
Weehawken, New Jersey 07086

Re: UBS v. Struthers, FINRA arbitrration: Struthers v. UBS, San Diego Superior Court

Dear Mr. Bird: The attached Notice is being filed in court today. As I will be in Italy until August 6; then with by daughter in Princeton, NJ, I hereby request that any filings or notices in the arbitration or superior court case be transmitted by email to me at the email address shown herein.

Please be advised that shortly before departing on July 21, I faxed FINRA a handwritten note to the effect that I would be out of the country and would respond to the sur-Reply and supplemental sur-Reply in your letters of July 16-17. I object to your sur-Reply and supplemental sur-Reply and respectfully request that the Panel strike those letters/papers from the record. California superior courts do not permit sur-Replies, as they lead to endless reargument and rapidly escalate the cost of litigation. Regretably, however, it appears very unlikely that FINRA will act on this request, thereby forcing me and my client to expend attorney's time responding to unauthorized papers. While I did not spell out the point in fine detail in my hasty July 21 facsimile, I do herein and also intend to address the point in Struthers' papers in the court case: UBS's multiplicity of submissions, which are not permitted in superior court, demonstrates, in still another way, that the FINRA arbitration clause should not be enforced in this particular case, as the arbitration will not serve as a less expensive, more expeditious dispute resolution process than that of a court . In fact, to date UBS has used the FINRA arbitration procees to prejudice Struthers' procedural and substantive rights in ways that would not occur in superior court. To wit:

Before being subjected to UBS's endless sur-Reply process, we had the civility issues where UBS eagerly accepted my courtesy in extending UBS's time for filing an Answer from April 21 to May 31; yet, when asked to engage in reciprocal civility, UBS exhibited a complete lack of courtesy, (i) refusing to continue the July 7, pre-trial conference, with knowledge that I was scheduled and did begin a lengthy jury trial in a Los Angeles case on the day and at the time of the July 7 pre-hearing conference and (ii) refusing to agree to an extension of Struthers' time to nominate arbitrators for and select the Panel. Regretably, FINRA appears to have no civility rules under which it could sanction UBS for its counsel's misbehavior.

Moreover, largely due to the reputation of FINRA and its predecessor, my client and other women similarly situated perceive FINRA as a continuation of a"good old boy club," where a securities firm stands to suffer, at most, a 'slap on the wrist' in comparison to the justice that may be obtained from a jury in a courtroom in employment matters.

Finally, please be advised that, based on UBS's continuing course of procedural transgressions, and based on FINRA's failure to sanction UBS for engaging in them, and on other grounds, Struthers intends to file a Cross-Motion to Stay the FINRA Arbitration Until after Final Verdict in the superior court case in response to UBS's motion to compel arbitration before FINRA. I therefore request that you advise me concerning the date UBS has scheduled for it motion to compel arbtration in the superior court case.

David E. Rosenbaum

cc: [by email]
Rina Spiewak
Case Administrator
FINRA Dispute Resolution
Los Angeles, CA
e-mail: rina.spiewak@finra.org

Note to Ms. Rina Spiewak: I would appreciate it if you would please have copies of my handwritten fax to Hannah Yoo of your office dated July 21, 2008 transmitted to Mr. Bird and the Panel. Please also send a copy of this email and attachment to the Panel.

Additionally, as stated above, I specifically request that the Panel strike UBS's sur-Reply and supplemental sur-Reply, as these are unauthorized papers in California courts, and Mr. Bird signed an agreement to comply with California rules when he undertook the representation of UBS in this arbitration. I request that you relay this informal request, to the Panel along with the other material.

**The legal authority for striking Mr.. Bird's said sur-Reply etc.** is (a) his certification that he would comply with the rules and procedures of California courts in this arbitration proceeding and (b) the following California authorities: *Code of Civil Procedure* §1005(b) & (c) only permit filing of (i) the moving papers, (ii) the opposition, and (iii) the reply. Under the analogous provisions regarding appellate briefs in *California Rules of Court*, Rule 8.200(a)(4), "no other brief may be filed except with the permission of the presiding justice." California courts have the inherent power to strike any paper that is "filed in disregard of established procedural processes." E.g., *Neal v. Bank of America* (1949) 93 Cal.App.2d 678, 682; *Loser v. E. R. Bacon Co.* (1962) 201 Cal.App.2d 387, 389-390; *Kronsberg v. Milton J. Wershow Co.* (1965) 238 Cal. App. 2d 170, 173; *People v. Municipal Court* (1981) 116 Cal.App.3d 456, 458. The rationale of *Pacific Bell Wireless, LLC v. Public Utilities Com.* (2006) 140 Cal.App.4th 718, is in point and controlling in the circumstances presented herein. In that case, a party in an appeal attempted to submit an "index" of "key evidence" after the case was fully briefed. An opposing party objected on the ground that the "index" was, as here, "an attempt to file an unauthorized supplemental brief." In response, the court refused to rely on the said "index." *Pacific Bell Wireless, supra*, 140 Cal.App.4th at page 724, footnote 1.

Again, short of some communication from the Panel indicating that Mr. Bird's sur-Reply, etc. have been stricken and ordered disregarded, I will be forced to prepare a complete reply to those letters, again increasing the time and inconvenience to the employee, Struthers, to the advantage of her securities firm employer, UBS.

Thank you.

James A. Goodman CA State Bar No. 89715
Kathryn T. McGuigan CA State Bar No. 232112
EPSTEIN BECKER & GREEN, P.C.
1925 Century Park East, Suite 500
Los Angeles, California 90067-2506
Telephone: 310.556.8861
Facsimile: 310.553.2165
jgoodman@ebglaw.com
kmcguigan@ebglaw.com

Attorney for Defendant
UBS FINANCIAL SERVICES INC.
(improperly pled as "UBS Financial Services, Inc.")

**UNITED STATES DISTRICT COURT**

**SOUTHERN DISTRICT OF CALIFORNIA**

| | |
|---|---|
| GAIL STRUTHERS, an individual,<br><br>Plaintiff,<br><br>v.<br><br>UBS FINANCIAL SERVICES, INC., a corporation; and DOES 1 through 10, inclusive,<br><br>Defendants. | CASE NO. 08cv1381 H (JMA)<br><br>Judge Marilyn L. Huff<br><br>**DEFENDANT UBS FINANCIAL SERVICES, INC.'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS**<br><br>**DATE: October 6, 2008**<br>**TIME: 10:30 a.m.**<br>**CRTR: 13** |

**TO THE HONORABLE MARILYN L. HUFF, UNITED STATES DISTRICT COURT JUDGE:**

UBS Financial Services Inc. (improperly pled as "UBS Financial Services, Inc."), Defendant in the above-captioned case, hereby requests that this Court, pursuant to Federal Rules of Evidence, Rule 201, take judicial notice of the following:

1. The NASD Code of Arbitration Procedures for Industry Disputes. A true and correct copy of the NASD Code of Arbitration Procedures for Industry Disputes is attached hereto as Exhibit 13.

DATED: September 8, 2008

EPSTEIN BECKER & GREEN, P.C.

By: ______________________
James A. Goodman
Kathryn T. McGuigan

Attorneys for Defendant
UBS FINANCIAL SERVICES INC.
(improperly pled as "UBS Financial Services, Inc.")

*Gail Struthers v. UBS Financial Services, Inc.*
United States District Court - CASE NO. 08cv1381 H (JMA)

Judge Marilyn L. Huff

Courtroom 13

**DEFENDANT UBS FINANCIAL SERVICES INC.'S NOTICE OF MOTION AND MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATIONS OF JENNIFER NIES AND STEPHEN D. BIRD IN SUPPORT OF THEREOF**

# EXHIBIT "13"

# NASD

## CODE OF ARBITRATION PROCEDURE

## FOR

## INDUSTRY DISPUTES

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## PART I INTERPRETIVE MATERIAL, DEFINITIONS, ORGANIZATION AND AUTHORITY

### IM-13000. Failure to Act Under Provisions of Code of Arbitration Procedure for Industry Disputes

It may be deemed conduct inconsistent with just and equitable principles of trade and a violation of Rule 2110 for a member or a person associated with a member to:

(a) fail to submit a dispute for arbitration under the Code as required by the Code;

(b) fail to comply with any injunctive order issued pursuant to the Code;

(c) fail to appear or to produce any document in his possession or control as directed pursuant to provisions of the Code;

(d) fail to honor an award, or comply with a written and executed settlement agreement, obtained in connection with an arbitration submitted for disposition pursuant to the procedures specified by NASD, the New York, American, Boston, Cincinnati, Chicago, or Philadelphia Stock Exchanges, the Pacific Exchange, Inc., the Chicago Board Options Exchange, the Municipal Securities Rulemaking Board, or pursuant to the rules applicable to the arbitration of disputes before the American Arbitration Association or other dispute resolution forum selected by the parties where timely motion has not been made to vacate or modify such award pursuant to applicable law; or

(e) fail to comply with a written and executed settlement agreement, obtained in connection with a mediation submitted for disposition pursuant to the procedures specified by NASD.

All awards shall be honored by a cash payment to the prevailing party of the exact dollar amount stated in the award. Awards may not be honored by crediting the prevailing party's account with the dollar amount of the award, unless authorized by the express terms of the award or consented to in writing by the parties. Awards shall be honored upon receipt thereof, or within such other time period as may be prescribed by the award.

It may be deemed conduct inconsistent with just and equitable principles of trade and a violation of Rule 2110 for a member to require associated persons to waive the arbitration of disputes contrary to the provisions of the Code of Arbitration Procedure.

### 13100. Definitions

Unless otherwise defined in the Code, terms used in the Code and interpretive material, if defined in the NASD By-Laws, shall have the meaning as defined in the NASD By-Laws.

**(a) Associated Person**

The term "associated person" or "associated person of a member" means a person associated with a member, as that term is defined in paragraph (r).

**(b) Award**

An award is a document stating the disposition of a case.

**(c) Board**

The term "Board" means the Board of Directors of NASD Dispute Resolution, Inc.

**(d) Claim**

The term "claim" means an allegation or request for relief.

**(e) Claimant**

The term "claimant" means a party that files the statement of claim that initiates an arbitration under Rule 13302.

**(f) Code**

The term "Code" means the Code of Arbitration Procedure for Industry Disputes. For disputes involving customers, see the NASD Code of Arbitration Procedure for Customer Disputes.

**(g) Counterclaim**

The term "counterclaim" means a claim asserted against a claimant by a respondent.

**(h) Cross Claim**

The term "cross claim" means a claim asserted by a respondent against another already-named respondent.

**(i) Customer**

A customer shall not include a broker or dealer.

**(j) Day**

Except as otherwise provided, the term "day" means calendar day. If a deadline specified in the Code falls on a Saturday, Sunday or any NASD holiday, the deadline is extended until the next business day.

**(k) Director**

The term "Director" means the Director of NASD Dispute Resolution. Unless the Code provides that the Director may not delegate a specific function, the term includes NASD staff to whom the Director has delegated authority.

**(l) Dispute**

The term "dispute" means a dispute, claim or controversy. A dispute may consist of one or more claims.

**(m) Hearing**

The term "hearing" means the hearing on the merits of an arbitration under Rule 13600.

**(n) Hearing Session**

The term "hearing session" means any meeting between the parties and arbitrator(s) of four hours or less, including a hearing or a prehearing conference.

**(o) Member**

For purposes of the Code, the term "member" means any broker or dealer admitted to membership in NASD, whether or not the membership has been terminated or cancelled; and any broker or dealer admitted to membership in a self-regulatory organization that, with NASD consent, has required its members to arbitrate pursuant to the Code and/or to be treated as members of NASD for purposes of the Code, whether or not the membership has been terminated or cancelled.

**(p) Non-Public Arbitrator**

The term "non-public arbitrator" means a person who is otherwise qualified to serve as an arbitrator and:

(1) is or, within the past five years, was:

(A) associated with, including registered through, a broker or a dealer (including a government securities broker or dealer or a municipal securities dealer);

(B) registered under the Commodity Exchange Act;

(C) a member of a commodities exchange or a registered futures association; or

(D) associated with a person or firm registered under the Commodity Exchange Act;

(2) is retired from, or spent a substantial part of a career engaging in, any of the business activities listed in paragraph (p)(1);

(3) is an attorney, accountant, or other professional who has devoted 20 percent or more of his or her professional work, in the last two years, to clients who are engaged in any of the business activities listed in paragraph (p)(1); or

(4) is an employee of a bank or other financial institution and effects transactions in securities, including government or municipal securities, and commodities futures or options or supervises or monitors the compliance with the securities and commodities laws of employees who engage in such activities.

For purposes of this rule, the term "professional work" shall not include mediation services performed by mediators who are also arbitrators, provided that the mediator acts in the capacity of a mediator and does not represent a party in the mediation.

**(q) Panel**

The term "panel" means the arbitration panel, whether it consists of one or more arbitrators.

**(r) Person Associated with a Member**

The term "person associated with a member" means:

(1) A natural person registered under the Rules of NASD; or

(2) A sole proprietor, partner, officer, director, or branch manager of a member, or a natural person occupying a similar status or performing similar functions, or a natural person engaged in the investment banking or securities business who is directly or indirectly controlling or controlled by a member, whether or not any such person is registered or exempt from registration with NASD under the By-Laws or the Rules of NASD.

For purposes of the Code, a person formerly associated with a member is a person associated with a member.

**(s) Pleadings**

A pleading is a statement describing a party's causes of action or defenses. Documents that are considered pleadings are: a statement of claim, an answer, a counterclaim, a cross claim, a third party claim, and any replies.

**(t) Prehearing Conference**

The term "prehearing conference" means any hearing session, including an Initial Prehearing Conference, that takes place before the hearing on the merits begins.

**(u) Public Arbitrator**

The term "public arbitrator" means a person who is otherwise qualified to serve as an arbitrator and:

(1) is not engaged in the conduct or activities described in paragraphs (p)(1)-(4);

(2) was not engaged in the conduct or activities described in paragraphs (p)(1)-(4) for a total of 20 years or more;

(3) is not an investment adviser;

(4) is not an attorney, accountant, or other professional whose firm derived 10 percent or more of its annual revenue in the past two years from any persons or entities listed in paragraphs (p)(1)-(4);

(5) is not an attorney, accountant, or other professional whose firm derived $50,000 or more in annual revenue in the past two years from professional services rendered to any persons or entities listed in paragraph (p)(1) relating to any customer disputes concerning an investment account or transaction, including but not limited to, law firm fees, accounting firm fees, and consulting fees;

(6) is not employed by, and is not the spouse or an immediate family member of a person who is employed by, an entity that directly or indirectly controls, is controlled by, or is under common control with, any partnership, corporation, or other organization that is engaged in the securities business;

(7) is not a director or officer of, and is not the spouse or an immediate family member of a person who is a director or officer of, an entity that directly or indirectly controls, is controlled by, or is under common control with, any partnership, corporation, or other organization that is engaged in the securities business; and

(8) is not the spouse or a family member of a person who is engaged in the conduct or activities described in paragraphs (p)(1)-(4). For purposes of this rule, the term immediate family member means:

(A) a person's parent, stepparent, child, or stepchild;

(B) a member of a person's household;

(C) an individual to whom a person provides financial support of more than 50 percent of his or her annual income; or

(D) a person who is claimed as a dependent for federal income tax purposes.

For purposes of this rule, the term "revenue" shall not include mediation fees received by mediators who are also arbitrators, provided that the mediator acts in the capacity of a mediator and does not represent a party in the mediation.

**(v) Related Claim**

For purposes of Rule 13803, the term "related claim" means any claim that arises out of the employment or termination of employment of an associated person.

**(w) Respondent**

The term "respondent" means a party against whom a statement of claim or third party claim has been filed. A claimant against whom a counterclaim has been filed is not a respondent for purposes of the Code.

**(x) Statement of Claim**

The term "statement of claim" means the initial or amended claim filed by the party or parties initiating the arbitration.

**(y) Statutory Employment Discrimination Claim**

The term "statutory employment discrimination claim" means a claim alleging employment discrimination, including a sexual harassment claim, in violation of a statute.

**(z) Temporary Injunctive Order**

The term "temporary injunctive order" means a temporary restraining order, preliminary injunction or other form of initial, temporary injunctive relief.

**(aa) Third Party Claim**

The term "third party claim" means a claim asserted against a party not already named in the statement of claim or any other previous pleading.

**(bb) Uniform Submission Agreement**

The term "Uniform Submission Agreement" means the NASD Uniform Submission Agreement. The NASD Uniform Submission Agreement is a document that parties must sign at the outset of an arbitration in which they agree to submit to arbitration under the Code.

**13101. Applicability of Code and Incorporation by Reference**

**(a) Applicability of Code**

The Code applies to any dispute that is submitted to arbitration under the Code pursuant to Rules 13200, 13201, or 13202.

**(b) Incorporation by Reference**

When a dispute is submitted to arbitration under the Code pursuant to an arbitration agreement, the Code is incorporated by reference into the agreement.

**13102. National Arbitration and Mediation Committee**

(a) Pursuant to Section III of the Plan of Allocation and Delegation of Functions by NASD to Subsidiaries ("Delegation Plan"), the Board shall appoint a National Arbitration and Mediation Committee ("NAMC").

(1) The NAMC shall consist of no fewer than 10 and no more than 25 members. At least 50 percent of the NAMC shall be Non-Industry members.

(2) The Chairperson of the Board shall name the chairperson of the NAMC.

(b) Pursuant to the Delegation Plan, the NAMC shall have the authority to recommend rules, regulations, procedures and amendments relating to arbitration, mediation, and other dispute resolution matters to the Board. All matters recommended by the NAMC to the Board must have been approved by a quorum, which shall consist of a majority of the NAMC, including at least 50 percent of the Non-Industry committee members. If at least 50 percent of the Non-Industry committee members are either (i) present at or (ii) have filed a waiver of attendance for a meeting after receiving an agenda prior to such meeting, the requirement that at least 50 percent of the Non-Industry committee members be present to constitute the quorum shall be waived. The NAMC has such other power and authority as is necessary to carry out the purposes of the Code.

(c) The NAMC may meet as frequently as necessary, but must meet at least once a year.

**13103. Director of Dispute Resolution**

(a) The Board shall appoint a Director of Dispute Resolution. The Director shall perform all the administrative duties relating to arbitrations submitted under the Code. The Director may delegate his or her duties when it is appropriate, unless the Code provides otherwise.

(b) The Director shall consult with the NAMC at the NAMC's request.

(c) The President of NASD Dispute Resolution may perform the Director's duties. If the Director is unable to perform his or her duties, the President of NASD Dispute Resolution may appoint an interim Director.

**13104. Effect of Arbitration on NASD Regulatory Activities**

(a) Submitting a dispute to arbitration under the Code does not limit or preclude any right, action or determination by NASD that it would otherwise be authorized to adopt, administer or enforce.

(b) Only at the conclusion of an arbitration, any arbitrator may refer to NASD for disciplinary investigation any matter that has come to the arbitrator's attention during and in connection with the arbitration, either from the record of the proceeding or from material or communications related to the arbitration, which the arbitrator has reason to believe may constitute a violation of NASD's rules, the federal securities laws, or other applicable rules or laws.

**13105. Agreement of the Parties**

(a) Except as provided in paragraph (b), if the Code provides that the parties may agree to modify a provision of the Code, or a decision of the Director or the panel, the written agreement of all named parties is required.

(b) If the Director or the panel determines that a named party is inactive in the arbitration, or has failed to respond after adequate notice has been given, the Director or the panel may determine that the written agreement of that party is not required while the party is inactive or not responsive. For purposes of this rule, an inactive party could be, but is not limited to: (1) a party that does not answer; (2) a party that answers and then fails to respond to correspondence sent by the Director; (3) a party that answers and then fails to respond to correspondence sent by the panel in cases involving direct communication under Rule 13211; or (4) a party that does not attend pre-hearing conferences.

## PART II GENERAL ARBITRATION RULES

### 13200. Required Arbitration

**(a) Generally**

Except as otherwise provided in the Code, a dispute must be arbitrated under the Code if the dispute arises out of the business activities of a member or an associated person and is between or among:

- Members;
- Members and Associated Persons; or
- Associated Persons.

**(b) Insurance Activities**

Disputes arising out of the insurance business activities of a member that is also an insurance company are not required to be arbitrated under the Code.

### 13201. Statutory Employment Discrimination Claims

A claim alleging employment discrimination, including sexual harassment, in violation of a statute, is not required to be arbitrated under the Code. Such a claim may be arbitrated only if the parties have agreed to arbitrate it, either before or after the dispute arose. If the parties agree to arbitrate such a claim, the claim will be administered under Rule 13802.

### 13202. Claims Involving Registered Clearing Agencies

If a registered clearing agency has entered into an agreement to use NASD's arbitration facilities and procedures, any dispute, claim or controversy involving that registered clearing agency, or participants, pledges or other persons using the facilities of the registered clearing agency will be arbitrated in accordance with such agreement and the rules of the registered clearing agency.

### 13203. Denial of NASD Forum

(a) The Director may decline to permit the use of the NASD arbitration forum if the Director determines that, given the purposes of NASD and the intent of the Code, the subject matter of the dispute is inappropriate, or that accepting the matter would pose a risk to the health or safety of arbitrators, staff, or parties or their representatives. Only the Director or the President of NASD Dispute Resolution may exercise the Director's authority under this rule.

(b) Disputes that arise out of transactions in a readily identifiable market may be referred to the arbitration forum for that market, if the claimant agrees.

**13204. Class Action Claims**

(a) Class action claims may not be arbitrated under the Code.

(b) Any claim that is based upon the same facts and law, and involves the same defendants as in a court-certified class action or a putative class action, or that is ordered by a court for class-wide arbitration at a forum not sponsored by a self-regulatory organization, shall not be arbitrated under the Code, unless the party bringing the claim files with NASD one of the following:

(1) a copy of a notice filed with the court in which the class action is pending that the party will not participate in the class action or in any recovery that may result from the class action, or has withdrawn from the class according to any conditions set by the court; or

(2) a notice that the party will not participate in the class action or in any recovery that may result from the class action.

(c) The Director will refer to a panel any dispute as to whether a claim is part of a class action, unless a party asks the court hearing the class action to resolve the dispute within 10 days of receiving notice that the Director has decided to refer the dispute to a panel.

(d) A member or associated person may not enforce any arbitration agreement against a member of a certified or putative class action with respect to any claim that is the subject of the certified or putative class action until:

- The class certification is denied;
- The class is decertified;
- The member of the certified or putative class is excluded from the class by the court; or
- The member of the certified or putative class elects not to participate in the class or withdraws from the class according to conditions set by the court, if any.

This paragraph does not otherwise affect the enforceability of any rights under the Code or any other agreement.

**13205. Shareholder Derivative Actions**

Shareholder derivative actions may not be arbitrated under the Code.

**13206. Time Limits**

**(a) Time Limitation on Submission of Claims**

No claim shall be eligible for submission to arbitration under the Code where six years have elapsed from the occurrence or event giving rise to the claim. The panel will resolve any questions regarding the eligibility of a claim under this rule.

**(b) Dismissal under Rule**

Dismissal of a claim under this rule does not prohibit a party from pursuing the claim in court. By filing a motion to dismiss a claim under this rule, the moving party agrees that if the panel dismisses a claim under this rule, the non-moving party may withdraw any remaining related claims without prejudice and may pursue all of the claims in court.

**(c) Effect of Rule on Time Limits for Filing Claim in Court**

The rule does not extend applicable statutes of limitations; nor shall the six-year time limit on the submission of claims apply to any claim that is directed to arbitration by a court of competent jurisdiction upon request of a member or associated person. However, where permitted by applicable law, when a claimant files a statement of claim in arbitration, any time limits for the filing of the claim in court will be tolled while NASD retains jurisdiction of the claim.

**(d) Effect of Filing a Claim in Court on Time Limits for Filing in Arbitration**

If a party submits a claim to a court of competent jurisdiction, the six-year time limitation will not run while the court retains jurisdiction of the claim matter.

**13207. Extension of Deadlines**

(a) The parties may agree in writing to extend or modify any deadline for:

- Serving an answer;
- Returning arbitrator or chairperson lists;
- Responding to motions; or
- Exchanging documents or witness lists.

If the parties agree to extend or modify a deadline under this rule, they must notify the Director of the new deadline in writing.

(b) The panel may extend or modify any deadline listed in paragraph (a), or any other deadline set by the panel, either on its own initiative or upon motion of a party.

(c) The Director may extend or modify any deadline or time period set by the Code for good cause. The Director may also extend or modify any deadline or time period set by the panel in extraordinary circumstances.

**13208. Representation of Parties**

**(a) Representation by a Party**

Parties may represent themselves in an arbitration held in a United States hearing location. A member of a partnership may represent the partnership; and a bona fide officer of a corporation, trust, or association may re present the corporation, trust, or association.

**(b) Representation by an Attorney**

At any stage of an arbitration proceeding held in a United States hearing location, all parties shall have the right to be represented by [counsel during any stage of an arbitration] an attorney at law in good standing and admitted to practice before the Supreme Court of the United States or the highest court of any state of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States, unless state law prohibits such representation.

**(c) Representation by Others**

Parties may be represented in an arbitration by a person who is not an attorney, unless:

- state law prohibits such representation, or
- the person is currently suspended or barred from the securities industry in any capacity, or
- the person is currently suspended from the practice of law or disbarred.

**(d) Qualifications of Representative**

Issues regarding the qualifications of a person to represent a party in arbitration are governed by applicable law and may be determined by an appropriate court or other regulatory agency. In the absence of a court order, the arbitration proceeding shall not be stayed or otherwise delayed pending resolution of such issues.

**13209. Legal Proceedings**

During an arbitration, no party may bring any suit, legal action, or proceeding against any other party that concerns or that would resolve any of the matters raised in the arbitration.

**13210. Ex Parte Communications**

(a) Except as provided in Rule 13211, no party, or anyone acting on behalf of a party, may communicate with any arbitrator outside of a scheduled hearing or conference regarding an arbitration unless all parties or their representatives are present.

(b) No party, or anyone acting on behalf of a party, may send or give any written motion, request, submission or other materials directly to any arbitrator, unless the arbitrators and the parties agree, or the Code provides otherwise.

**13211. Direct Communication Between Parties and Arbitrators**

(a) This rule provides procedures under which parties and arbitrators may communicate directly.

(b) Only parties that are represented by counsel may use direct communication under this rule. If, during the proceeding, a party chooses to appear *pro se* (without counsel), this rule shall no longer apply.

(c) All arbitrators and all parties must agree to the use of direct communication during the Initial Prehearing Conference or a later conference or hearing before it can be used.

(d) Parties may send the arbitrators only items that are listed in an order.

(e) Parties may send items by regular mail, overnight courier, facsimile, or email. All the arbitrators and parties must have facsimile or email capability before such a delivery method may be used.

(f) Copies of all materials sent to arbitrators must also be sent at the same time and in the same manner to all parties and the Director. Materials that exceed 15 pages, however, shall be sent to the Director only by regular mail or overnight courier.

(g) The Director must receive copies of any orders and decisions made as a result of direct communications among the parties and the arbitrators.

(h) Parties may not communicate orally with any of the arbitrators outside the presence of all parties.

(i) Any party or arbitrator may terminate the direct communication order at any time, after giving written notice to the other arbitrators and the parties.

**13212. Sanctions**

(a) The panel may sanction a party for failure to comply with any provision in the Code, or any order of the panel or single arbitrator authorized to act on behalf of the panel. Unless prohibited by applicable law, sanctions may include, but are not limited to:

- Assessing monetary penalties payable to one or more parties;
- Precluding a party from presenting evidence;
- Making an adverse inference against a party;
- Assessing postponement and/or forum fees; and
- Assessing attorneys' fees, costs and expenses.

(b) The panel may initiate a disciplinary referral at the conclusion of an arbitration.

(c) The panel may dismiss a claim, defense or arbitration with prejudice as a sanction for material and intentional failure to comply with an order of the panel if prior warnings or sanctions have proven ineffective.

**13213. Hearing Locations**

**(a) U.S. Hearing Location**

(1) The Director will decide which of NASD's hearing locations will be the hearing location for the arbitration. In cases involving an associated person, the Director will generally select the hearing location closest to where the associated person was employed at the time of the dispute. In cases involving members only or more than one associated person, the Director will consider a variety of factors, including:

- The parties' signed agreement to arbitrate, if any;
- Which party initiated the transaction or business in issue; and
- The location of essential witnesses and documents.

(2) Before arbitrator lists are sent to the parties under Rule 13403, the parties may agree in writing to a hearing location other than the one selected by the Director.

(3) The Director may change the hearing location upon motion of a party, as set forth in Rule 13503.

(4) After the panel is appointed, the panel may decide a motion relating to changing the hearing location.

**(b) Foreign Hearing Location**

(1) If the Director and all parties agree, parties may have their hearing in a foreign hearing location and conducted by foreign arbitrators, provided that the foreign arbitrators have:

(A) met NASD background qualifications for arbitrators;

(B) received training on NASD arbitration rules and procedures; and

(C) satisfied at least the same training and testing requirements as those arbitrators who serve in U. S. locations of NASD.

(2) The parties shall pay an additional surcharge for each day of hearings held in a foreign hearing location. The amount of the surcharge will be determined by the Director and must be agreed to by the parties before the foreign hearing location may be used. This surcharge shall be specified in the agreement to use a foreign hearing location and shall be apportioned equally among the parties, unless they agree otherwise. The foreign arbitrators shall have the authority to apportion this surcharge as provided in Rule 13902(c).

**13214. Payment of Arbitrators**

(a) Except as provided in paragraph (b) and Rule 13800, NASD will pay the panel an honorarium, as follows:

- $200 to each arbitrator for each hearing session in which he or she participates;
- an additional $75 per day to the chairperson for each hearing on the merits;
- $50 for travel to a hearing session that is postponed pursuant to Rule 13601; and
- $100 for each arbitrator if a hearing session other than a prehearing conference is postponed within three business days before a scheduled hearing session pursuant to Rules 13601(a)(2) and (b)(2).

(b) The Director may authorize a higher or additional honorarium for the use of a foreign hearing location.

(c) Payment for Deciding Discovery-Related Motions Without a Hearing Session

(1) NASD will pay each arbitrator an honorarium of $200 to decide a discovery-related motion without a hearing session. This paragraph does not apply to cases administered under Rule 13800.

(2) For purposes of paragraph (c)(1), a discovery-related motion and any replies or other correspondence relating to the motion shall be considered to be a single motion.

(3) The panel will allocate the cost of the honoraria under paragraph (c)(1) to the parties pursuant to Rule 13902(c).

(d) Payment for Deciding Contested Subpoena Requests Without a Hearing Session

(1) The honorarium for deciding one or more contested motions requesting the issuance of a subpoena without a hearing session shall be $200. The honorarium shall be paid on a per case basis to each arbitrator who decides the contested motion(s). The parties shall not be assessed more than $600 in fees under this paragraph in any arbitration proceeding. The honorarium shall not be paid for cases administered under Rule 13800.

(2) For purposes of paragraph (d)(1), a contested motion requesting the issuance of a subpoena shall include a motion requesting the issuance of a subpoena, the draft subpoena, a written objection from the party opposing the issuance of the subpoena, and any other documents supporting a party's position.

(3) The panel will allocate the cost of the honorarium under paragraph (d)(1) to the parties pursuant to Rule 13902(c).

## PART III INITIATING AND RESPONDING TO CLAIMS

### 13300. Filing and Serving Documents

(a) Initial statements of claim must be filed with the Director, with enough copies for each other party and each arbitrator. The number of arbitrators is determined in accordance with Rule 13401. The Director will serve the statement of claim on the other parties, and send copies of the statement of claim to each arbitrator.

(b) The parties must serve all other pleadings and other documents directly on each other party. Parties must serve all pleadings on all parties at the same time and in the same manner, unless the parties agree otherwise.

(c) Unless the Code provides otherwise, parties must also file all pleadings and other documents with the Director, with additional copies for each arbitrator. Pleadings and other documents must be filed with the Director at the same time and in the same manner in which they are served on the other parties. Parties filing pleadings and other documents with the Director must include a certificate of service stating the names of the parties served, the date and method of service, and the address(es) to which service was made.

(d) Pleadings and other documents may be filed and served by: first class mail; overnight mail or delivery service; hand delivery; facsimile; or any other method, including electronic mail, that is approved or required by the panel.

(e) Filing and service are accomplished on the date of mailing either by first-class postage prepaid mail or overnight mail service, or, in the case of other means of service, on the date of delivery. Whenever pleadings and other documents must be filed with the Director and served on the other parties, filing and service must occur on the same day and in the same manner, unless the parties agree or the panel directs otherwise.

(f) A party must inform the Director and all other parties in writing of any change of address during an arbitration.

### 13301. Service on Associated Persons

(a) The Director will serve the initial statement of claim on an associated person directly at the person's residential address or usual place of abode. If service cannot be completed at the person's residential address or usual place of abode, the Director will serve the initial statement of claim on the associated person at the person's business address.

(b) If a member and a person currently associated with the member are named as respondents to the same arbitration, and the Director cannot complete service as provided in paragraph (a), then the Director may serve the member with the initial statement of claim on behalf of the associated person. If service is made on the member, the member must serve the associated person, even if the member will not be representing the associated person in the arbitration. If the member is not representing the associated person in the arbitration, the member must notify, and provide the associated person's current address to, all parties and the Director.

**13302. Filing an Initial Statement of Claim**

**(a) Filing Claim with the Director**

(1) To initiate an arbitration, a claimant must file the following with the Director:

- Signed and dated Uniform Submission Agreement; and
- A statement of claim specifying the relevant facts and remedies requested.

The claimant may include any additional documents supporting the statement of claim.

(2) A claimant may use the online claim notification and filing procedure to complete part of the arbitration claim filing process through the Internet. To commence this process, a claimant may complete a Claim Information Form that can be accessed through www.finra.org. In completing the Claim Information Form, the claimant may attach an electronic version of the statement of claim, and any additional documents supporting the statement of claim, to the form. Once this online form has been completed, a FINRA Dispute Resolution Tracking Form will be generated and displayed for the claimant to reproduce as necessary. The claimant shall then file with the Director the rest of the materials required in subparagraph (1) of the rule, along with a hard copy of the FINRA Dispute Resolution Tracking Form.

**(b) Number of Copies**

The claimant must file enough copies of the statement of claim, if it has not been submitted electronically, and the signed Uniform Submission Agreement, and any additional materials, for the Director, each arbitrator and each other party.

**(c) Fees**

At the time the statement of claim is filed, the claimant must pay all required filing fees.

**(d) Service by Director**

Unless the statement of claim is deficient under Rule 13307, the Director will send a copy of the Uniform Submission Agreement, the statement of claim, and any additional materials filed by the claimant, to each other party, and to each arbitrator once the panel has been appointed.

**13303. Answering the Statement of Claim**

(a) Respondent(s) must directly serve each other party with the following documents within 45 days of receipt of the statement of claim:

- Signed and dated Uniform Submission Agreement; and

- An answer specifying the relevant facts and available defenses to the statement of claim.

The respondent may include any additional documents supporting the answer to the statement of claim. Parties that fail to answer in the time provided may be subject to default proceedings under Rule 13801.

(b) The answer to the statement of claim may include any counterclaims against the claimant, cross claims against other respondents, or third party claims, specifying all relevant facts and remedies requested, as well as any additional documents supporting such claim. When serving a third party claim, the respondent must provide each new respondent with copies of all documents previously served by any party, or sent to the parties by the Director.

(c) At the same time that the answer to the statement of claim is served on the other parties, the respondent must file copies of the Uniform Submission Agreement, the answer to the statement of claim, and any additional documents, with the Director, with enough copies for the Director and each arbitrator.

(d) If the answer to the statement of claim contains any counterclaims, cross claims or third party claims, the respondent must pay all required filing fees.

**13304. Answering Counterclaims**

(a) A claimant must directly serve any answer to a counterclaim on each other party within 20 days of receipt of the counterclaim. At the same time, the claimant must file the answer to the counterclaim with the Director with additional copies for each arbitrator.

(b) The answer must include the relevant facts and available defenses to the counterclaim. The claimant may include any additional documents supporting the answer to the counterclaim.

**13305. Answering Cross Claims**

(a) A respondent must directly serve an answer to a cross claim on each other party within 20 days from the date that the respondent's answer to the statement of claim is due, or from the receipt of the cross claim, whichever is later. At the same time, the respondent must file the answer to the cross claim with the Director with additional copies for each arbitrator.

(b) The answer must include the relevant facts and available defenses to the cross claim. The respondent may include any additional documents supporting the answer to the cross claim.

**13306. Answering Third Party Claims**

(a) A party responding to a third party claim must directly serve all other parties with the following documents within 45 days of receipt of the third party claim:

- Signed and dated Uniform Submission Agreement; and

- An answer specifying the relevant facts and available defenses to the third party claim.

The respondent may include any additional documents supporting the answer to the third party claim.

(b) The answer to the third party claim may also include any counterclaims, cross claims, or third party claims, specifying all relevant facts and remedies requested. The answer may also include any additional documents supporting such claim. When serving a third party claim, the respondent must provide each new respondent with copies of all documents previously served by any party, or sent to the parties by the Director.

(c) At the same time that the answer to the third party claim is served on the other parties, the third party respondent must also file copies of the Uniform Submission Agreement, the answer to the third party claim, and any additional documents, with the Director, with additional copies for each arbitrator.

(d) If the answer to the third party claim contains any counterclaim, cross claim or third party claim, the party must also pay all required filing fees.

**13307. Deficient Claims**

(a) The Director will not serve any claim that is deficient. The reasons a claim may be deficient include the following:

- A Uniform Submission Agreement was not filed by each claimant;
- The Uniform Submission Agreement was not properly signed and dated;
- The Uniform Submission Agreement does not name all parties named in the claim;
- The claimant did not file the correct number of copies of the Uniform Submission Agreement, statement of claim or supporting documents for service on respondents and for the arbitrators;
- The claim does not specify the claimant's or the claimant's representative's current address; or
- The claimant did not pay all required filing fees, unless the Director deferred the fees.

(b) The Director will notify the claimant in writing if the claim is deficient. If all deficiencies are not corrected within 30 days from the time the claimant receives notice, the Director will close the case without serving the claim, and will not refund any filing fees paid by the claimant.

(c) The panel will not consider any counterclaim, cross claim or third party claim that is deficient. The reasons a counterclaim, cross claim or third party claim may be deficient include the reasons listed in paragraph (a). The Director will notify the party making the counterclaim, cross claim or third party claim of the any deficiencies in writing. If all deficiencies are not corrected within 30 days from the time the party making the counterclaim, cross claim or third party claim receives notice of the deficiency, the panel will proceed with the arbitration as though the deficient counterclaim, cross claim or third party claim had not been made.

**13308. Loss of Defenses Due to Untimely or Incomplete Answer**

(a) If a party does not answer within the time period specified in the Code, the panel may, upon motion, bar that party from presenting any defenses or facts at the hearing, unless the time to answer was extended in accordance with the Code. The party may also be subject to default proceedings under Rule 13801, if the conditions of Rule 13801(a) apply.

(b) If a party answers a claim that alleges specific facts and contentions with a general denial, or fails to include defenses or relevant facts in its answer that were known to it at the time the answer was filed, the panel may bar that party from presenting the omitted defenses or facts at the hearing.

**13309. Amending Pleadings**

**(a) Before Panel Appointment**

Except as provided in paragraph (c), a party may amend a pleading at any time before the panel has been appointed.

(1) To amend a statement of claim that has been filed but not yet served by the Director, the claimant must file the amended claim with the Director, with additional copies for each arbitrator and each other party. The Director will then serve the amended claim in accordance with Rules 13300 and 13301.

(2) To amend any other pleading, a party must serve the amended pleading on each party. At the same time, the party must file the amended pleading with the Director, with additional copies for each arbitrator. If a pleading is amended to add a party to the arbitration, the party amending the pleading must provide each new party with copies of all documents previously served by any party, or sent to the parties by the Director.

**(b) After Panel Appointment**

Once a panel has been appointed, a party may only amend a pleading if the panel grants a motion to amend in accordance with Rule 13503. Motions to amend a pleading must include a copy of the proposed amended pleading. If the panel grants the motion to amend, the amended pleading does not need to be re-served on the other parties, the Director, or the panel, unless the panel determines otherwise.

**(c) Amendments to Add Parties**

Once the ranked arbitrator lists are due to the Director under Rule 13404(c), no party may amend a pleading to add a new party to the arbitration until a panel has been appointed and the panel grants a motion to add the party. Motions to add a party after panel appointment must be served on all parties, including the party to be added, and the party to be added may respond to the motion in accordance with Rule 13503 without waiving any rights or objections under the Code.

**(d) Responding to an Amended Pleading**

Any party may file a response to an amended pleading, provided the response is filed and served within 20 days of receipt of the amended pleading, unless the panel determines otherwise.

**13310. Answering Amended Claims**

(a) If a claim is amended before it has been answered, the respondent's original time to answer is extended by 20 days.

(b) If a claim is amended after it has been answered, but before a panel has been appointed, the respondent has 20 days from the time the amended claim is served to serve an amended answer.

(c) If a claim is amended after a panel has been appointed, the respondent has 20 days from the time the respondent receives notice that the panel has granted the motion to amend the claim to serve an amended answer.

(d) The amended answer must be directly served on each other party. At the same time, the amended answer must also be filed with the Director, with additional copies for each arbitrator.

(e) If the amended claim adds a new party to the arbitration, the new party's answer is governed by Rule 13306.

**13311. Amendments to Amount in Dispute**

If an amended pleading increases the amount in dispute, all filing fees, surcharges and process fees required by the Code will be recalculated based on the new amount in dispute.

**13312. Multiple Claimants**

(a) One or more parties may join multiple claims together in the same arbitration if the claims contain common questions of law or fact and:

- The claims assert any right to relief jointly and severally; or

- The claims arise out of the same transaction or occurrence, or series of transactions or occurrences.

(b) After all responsive pleadings have been served, claims joined together under paragraph (a) of this rule may be separated into two or more arbitrations by the Director before a panel is appointed, or by the panel after the panel is appointed. A party whose claims were separated by the Director may make a motion to the panel in the lowest numbered case to reconsider the Director's decision.

**13313. Multiple Respondents**

(a) One or more parties may name one or more respondents in the same arbitration if the claims contain any questions of law or fact common to all respondents and:

- The claims are asserted against the respondents jointly and severally; or
- The claims arise out of the same transaction or occurrence, or series of transactions or occurrences.

(b) After all responsive pleadings have been served, claims joined together under paragraph (a) of this rule may be separated into two or more arbitrations by the Director before a panel is appointed, or by the panel after the panel is appointed. A party whose claims were separated by the Director may make a motion to the panel in the lowest numbered case to reconsider the Director's decision.

**13314. Combining Claims**

Before ranked arbitrator lists are due to the Director under Rule 13404(c), the Director may combine separate but related claims into one arbitration. Once a panel has been appointed, the panel may reconsider the Director's decision upon motion of a party.

## PART IV APPOINTMENT, DISQUALIFICATION, AND AUTHORITY OF ARBITRATORS

### 13400. Neutral List Selection System and Arbitrator Rosters

#### (a) Neutral List Selection System

The Neutral List Selection System is a computer system that generates, on a random basis, lists of arbitrators from NASD's rosters of arbitrators for the selected hearing location for each proceeding. The parties will select their panel through a process of striking and ranking the arbitrators on lists generated by the Neutral List Selection System.

#### (b) Arbitrator Rosters

NASD maintains the following roster of arbitrators:

- A roster of non-public arbitrators as defined in Rule 13100 (p);
- A roster of public arbitrators as defined in Rule 13100 (u); and
- A roster of arbitrators who are eligible to serve as chairperson of a panel as described in paragraph (c). Arbitrators who are eligible to serve as chairperson will also be included in the roster of non-public or public arbitrators, depending on composition of the panel under Rule 13402, but will only appear on one list in a case.

#### (c) Eligibility for Chairperson Roster

Arbitrators are eligible to serve as chairperson of panels submitted for arbitration under the Code if they have completed chairperson training provided by NASD or have substantially equivalent training or experience and:

- Have a law degree and are a member of a bar of at least one jurisdiction and have served as an arbitrator through award on at least two arbitrations administered by a self-regulatory organization in which hearings were held; or
- Have served as an arbitrator through award on at least three arbitrations administered by a self-regulatory organization in which hearings were held.

### 13401. Number of Arbitrators

#### (a) Claims of $25,000 or Less

If the amount of a claim is $25,000 or less, exclusive of interest and expenses, the panel will consist of one arbitrator and the claim is subject to the simplified arbitration procedures under Rule 13800.

**(b) Claims of More Than $25,000 Up To $50,000**

If the amount of a claim is more than $25,000 but not more than $50,000, exclusive of interest and expenses, the panel will consist of one arbitrator unless any party requests a panel of three arbitrators in its initial pleading.

**(c) Claims of More Than $50,000; Unspecified or Non-Monetary Claims**

If the amount of a claim is more than $50,000, exclusive of interest and expenses, or is unspecified, or if the claim does not request money damages, the panel will consist of three arbitrators, unless the parties agree in writing to one arbitrator.

**13402. Composition of Arbitration Panels in Cases Not Involving a Statutory Discrimination Claim**

*For disputes involving statutory employment discrimination claims, see Rule 13802.*

**(a) Disputes Between Members, or Employment Disputes Between or Among Member Firms and Associated Persons Relating Exclusively To Employment Contracts, Promissory Notes, or Receipt of Commissions**

- If the panel consists of one arbitrator, the arbitrator will be a non-public arbitrator selected from the non-public chairperson roster described in Rule 13400(c), unless the parties agree in writing otherwise.

- If the panel consists of three arbitrators, all will be non-public arbitrators. One of the arbitrators will be selected from the non-public chairperson roster described in Rule 13400(c), unless the parties agree in writing otherwise.

**(b) Other Disputes Between or Among Members and Associated Persons**

- If the panel consists of one arbitrator, the arbitrator will be a public arbitrator selected from the chairperson roster described in Rule 12400(c) of the Code of Arbitration Procedure for Customer Disputes, unless the parties agree in writing otherwise.

- If the panel consists of three arbitrators, one will be a non-public arbitrator and two will be public arbitrators. One of the public arbitrators will be selected from the chairperson roster described in Rule 12400(c) of the Code of Arbitration Procedure for Customer Disputes, unless the parties agree in writing otherwise.

**13403. Generating and Sending Lists to the Parties**

*For disputes involving statutory employment discrimination claims, see Rule 13802.*

**(a) Disputes Between or Among Members, or Employment Disputes Between or Among Member Firms and Associated Persons Relating Exclusively To Employment Contracts, Promissory Notes, or Receipt of Commissions**

(1) If the panel consists of one arbitrator, the Neutral List Selection System will generate a list of eight non-public arbitrators from the NASD's non-public chairperson roster.

(2) If the panel consists of three non-public arbitrators, the Neutral List Selection System will generate:

- A list of 16 arbitrators from the NASD's non-public roster; and
- A list of eight non-public arbitrators from the NASD's non-public chairperson roster.

(3) If the panel consists of three arbitrators, the Neutral List Selection System will generate the non-public chairperson list first. Chair-qualified arbitrators who were not selected for the non-public chairperson list will be eligible for selection on the non-public list. An individual arbitrator cannot appear on both the non-public chairperson list and the non-public list for the same case.

(4) The Neutral List Selection System will exclude arbitrators from the lists based upon current conflicts of interest identified within the Neutral List Selection System.

**(b) Other Disputes Between or Among Members and Associated Persons**

(1) If the panel consists of one arbitrator, the Neutral List Selection System will generate a list of eight public arbitrators from NASD's public chairperson roster.

(2) If the panel consists of three arbitrators, the Neutral List Selection System will generate:

- A list of eight arbitrators from the NASD's non-public arbitrator roster;
- A list of eight arbitrators from the NASD's public arbitrator roster; and
- A list of eight public arbitrators from the NASD's public chairperson roster.

(3) If the panel consists of three arbitrators, the Neutral List Selection System will generate the public chairperson list first. Chair-qualified arbitrators who were not selected for the public chairperson list will be eligible for selection on the public list. An individual arbitrator cannot appear on both the public chairperson list and the public list for the same case.

(4) The Neutral List Selection System will exclude arbitrators from the lists based upon current conflicts of interest identified within the Neutral List Selection System.

**(c) Sending Lists to Parties**

(1) The Director will send the lists generated by the Neutral List Selection System to all parties at the same time, within approximately 30 days after the last answer is due. The parties will also receive employment history for the past 10 years and other background information for each arbitrator listed.

(2) If a party requests additional information about an arbitrator, the Director will request the additional information from the arbitrator, and will send any response to all of the parties at the same time. When a party requests additional information, the Director may, but is not required to, toll the time for parties to return the ranked lists under Rule 13404(c).

**13404. Striking and Ranking Arbitrators**

(a) Except for lists generated pursuant to Rule 13403(a)(2), each separately represented party may strike up to four of the arbitrators from each list for any reason by crossing through the names of the arbitrators. At least four names must remain on each list.

(b) For lists generated pursuant to Rule 13403(a)(2), each separately represented party may strike up to eight of the arbitrators from the non-public list and up to four of the arbitrators from the non-public chairperson list for any reason by crossing through the names of the arbitrators. At least eight names must remain on the non-public list and at least four names must remain on the non-public chairperson list.

(c) Each separately represented party shall rank all remaining arbitrators on the lists in order of preference, with a "1" indicating the party's first choice, a "2" indicating the party's second choice, and so on. Each list of arbitrators must be ranked separately.

(d) The ranked lists must be returned to the Director no more than 20 days after the date upon which the Director sent the lists to the parties. If the Director does not receive a party's ranked lists within that time, the Director will proceed as though the party did not want to strike any arbitrator or have any preferences among the listed arbitrators.

**13405. Combining Lists**

For each arbitrator classification (public, non-public, and chairperson), the Director will prepare combined ranked lists of arbitrators based on the parties' numerical rankings, as follows:

- The Director will add the rankings of all claimants together, and the rankings of all respondents together, to produce separate combined ranked lists for the claimants and the respondents.

- The Director will then add the combined rankings of claimants and the respondents together, to produce a single combined ranking number for each arbitrator, excluding all arbitrators stricken by a party.

- The Director will create separate combined ranked lists for each arbitrator classification in cases with both public and non-public arbitrators.

**13406. Appointment of Arbitrators; Discretion to Appoint Arbitrators Not on List**

*For disputes involving statutory employment discrimination claims, see Rule 13802.*

**(a) Disputes Between Members, or Employment Disputes Between or Among Member Firms and Associated Persons Relating Exclusively To Employment Contracts, Promissory Notes, or Receipt of Commissions**

(1) If the panel consists of one arbitrator, the Director will appoint the highest-ranked available arbitrator from the combined non-public chairperson list.

(2) If the panel consists of three arbitrators, the Director will appoint a three-arbitrator panel consisting of:

- The two highest-ranked available arbitrators from the combined non-public arbitrator list; and

- The highest-ranked available arbitrator from the combined non-public chairperson list, who will serve as chairperson of the panel.

**(b) Other Disputes Between or Among Members and Associated Persons**

(1) If the panel consists of one arbitrator, the Director will appoint the highest-ranked available arbitrator from the combined public chairperson list.

(2) If the panel consists of three arbitrators, the Director will appoint a three-arbitrator panel consisting of:

- The highest-ranked available arbitrator from the combined non-public arbitrator list;

- The highest-ranked available arbitrator from the combined public arbitrator list; and

- The highest-ranked available arbitrator from the combined public chairperson list, who will serve as chairperson of the panel.

(c) If the number of arbitrators available to serve from the combined list(s) is not sufficient to fill an initial panel, the Director will appoint one or more arbitrators of the required classification to complete the panel from names generated randomly by the Neutral List Selection System. If the Director must appoint a non-public arbitrator, the Director may not appoint a non-public arbitrator as defined in Rule 13100 (p)(2) or (3), unless the parties agree otherwise. The Director will provide the parties information about the arbitrators as provided in

Rule 13403 and the parties will have the right to challenge the arbitrators as provided in Rule 13410.

(d) Appointment of arbitrators occurs when the Director sends notice to the parties of the names of the arbitrators on the panel. Before making any decision as an arbitrator or attending a hearing session, the arbitrators must execute NASD's arbitrator oath or affirmation.

**13407. Additional Parties**

(a) If a party is added to an arbitration after the Director sends the lists generated by the Neutral List Selection System to the parties, but before parties must return the ranked lists to the Director, the Director will send the lists to the newly added party, with employment history for the past 10 years and other background information for each arbitrator listed. The newly added party may rank and strike the arbitrators in accordance with Rule 13404. If the newly added party returns the lists within 20 days after the date upon which the Director sent the lists to the party, the Director will include the new party's lists when combining rankings under Rule 13405. If the Director does not receive the list within that time, the Director will proceed as though the party did not want to strike any arbitrator, or have any preference among the listed arbitrators.

(b) Once the ranked lists are due to the Director under Rule 13404, no party may amend a pleading to add a new party to the arbitration until a panel is appointed and grants a motion to add the party. Motions to add a party must be served on all parties, including the party to be added, and the party to be added may respond to the motion in accordance with Rule 13503 without waiving any rights or objections under the Code. If the panel grants the motion to add the party, the newly added party may not strike and rank the arbitrators, but may challenge an arbitrator for cause in accordance with Rule 13410.

**13408. Disclosures Required of Arbitrators**

(a) Before appointing arbitrators to a panel, the Director will notify the arbitrators of the nature of the dispute and the identity of the parties. Each potential arbitrator must make a reasonable effort to learn of, and must disclose to the Director, any circumstances which might preclude the arbitrator from rendering an objective and impartial determination in the proceeding, including:

(1) Any direct or indirect financial or personal interest in the outcome of the arbitration;

(2) Any existing or past financial, business, professional, family, social, or other relationships or circumstances with any party, any party's representative, or anyone who the arbitrator is told may be a witness in the proceeding, that are likely to affect impartiality or might reasonably create an appearance of partiality or bias;

(3) Any such relationship or circumstances involving members of the arbitrator's family or the arbitrator's current employers, partners, or business associates; and

(4) Any existing or past service as a mediator for any of the parties in the case for which the arbitrator has been selected.

(b) The obligation to disclose interests, relationships, or circumstances that might preclude an arbitrator from rendering an objective and impartial determination described in paragraph (a) is a continuing duty that requires an arbitrator who accepts appointment to an arbitration proceeding to disclose, at any stage of the proceeding, any such interests, relationships, or circumstances that arise, or are recalled or discovered.

(c) The Director will inform the parties to the arbitration of any information disclosed to the Director under this rule unless the arbitrator who disclosed the information declines appointment or voluntarily withdraws from the panel as soon as the arbitrator learns of any interest, relationship or circumstance that might preclude the arbitrator from rendering an objective and impartial determination in the proceeding, or the Director removes the arbitrator.

**13409. Arbitrator Recusal**

Any party may ask an arbitrator to recuse himself or herself from the panel for good cause. Requests for arbitrator recusal are decided by the arbitrator who is the subject of the request.

**13410. Removal of Arbitrator by Director**

**(a) Before First Hearing Session Begins**

Before the first hearing session begins, the Director may remove an arbitrator for conflict of interest or bias, either upon request of a party or on the Director's own initiative.

(1) The Director will grant a party's request to remove an arbitrator if it is reasonable to infer, based on information known at the time of the request, that the arbitrator is biased, lacks impartiality, or has a direct or indirect interest in the outcome of the arbitration. The interest or bias must be direct, definite, and capable of reasonable demonstration, rather than remote or speculative.

(2) The Director must first notify the parties before removing an arbitrator on the Director's own initiative. The Director may not remove the arbitrator if the parties agree in writing to retain the arbitrator within five days of receiving notice of the Director's intent to remove the arbitrator.

**(b) After First Hearing Session Begins**

After the first hearing session begins, the Director may remove an arbitrator based only on information required to be disclosed under Rule 13408 that was not previously known by the parties. The Director may exercise this authority upon request of a party or on the Director's own initiative. Only the Director or the President of NASD Dispute Resolution may exercise the Director's authority under this paragraph (b).

**13411. Replacement of Arbitrators**

(a) If an arbitrator is removed, or becomes otherwise unable or unwilling to serve, the Director will appoint a replacement arbitrator in accordance with this rule, unless the parties agree in writing to proceed with only the remaining arbitrators.

(b) The Director will appoint as a replacement arbitrator the arbitrator who is the most highly ranked available arbitrator of the required classification remaining on the combined list.

(c) If there are no available arbitrators of the required classification on the consolidated list, the Director will appoint an arbitrator of the required classification to complete the panel from names generated by the Neutral List Selection System. The Director will provide the parties information about the arbitrator as provided in Rule 13403, and the parties shall have the right to object to the arbitrator as provided in Rule 13410.

(d) If the Director must appoint a non-public arbitrator under paragraph (c), the Director may not appoint a non-public arbitrator as defined in Rule 13100 (p)(2) or (3), unless the parties agree otherwise.

**13412. Director's Discretionary Authority**

The Director may exercise discretionary authority and make any decision that is consistent with the purposes of the Code to facilitate the appointment of arbitrators and the resolution of arbitrations.

**13413. Jurisdiction of Panel and Authority to Interpret the Code**

The panel has the authority to interpret and determine the applicability of all provisions under the Code. Such interpretations are final and binding upon the parties.

**13414. Determinations of Arbitration Panel**

All rulings and determinations of the panel must be made by a majority of the arbitrators, unless the parties agree, or the Code or applicable law provides, otherwise.

## PART V PREHEARING PROCEDURES AND DISCOVERY

### 13500. Initial Prehearing Conference

(a) After the panel is appointed, the Director will schedule an Initial Prehearing Conference before the panel, except as provided in paragraph (c) of this rule.

(b) The Initial Prehearing Conference will generally be held by telephone. Unless the parties agree otherwise, the Director must notify each party of the time and place of the Initial Prehearing Conference at least 20 days before it takes place.

(c) At the Initial Prehearing Conference, the panel will set discovery, briefing, and motions deadlines, schedule subsequent hearing sessions, and address other preliminary matters. The parties may agree to forgo the Initial Prehearing Conference only if they jointly provide the Director with the following information, in writing, with additional copies for each arbitrator, before the Initial Prehearing Conference is scheduled to be held:

- A statement that the parties accept the panel;
- Whether any other prehearing conferences will be held, and if so, for each prehearing conference, a minimum of four mutually agreeable dates and times, and whether the chairperson or the full panel will preside;
- A minimum of four sets of mutually agreeable hearing dates;
- A discovery schedule;
- A list of all anticipated motions, with filing and response due dates; and
- A determination regarding whether briefs will be submitted, and, if so, the due date for the briefs and any reply briefs.

### 13501. Other Prehearing Conferences

(a) A prehearing conference may be scheduled upon the joint request of the parties or at the discretion of the Director. The Director will set the time and place of the prehearing conference and appoint a person to preside.

(b) At a party's request, or at the discretion of the panel, the panel may schedule one or more additional prehearing conferences regarding any outstanding preliminary matters, including:

- Discovery disputes;
- Motions;
- Witness lists and subpoenas;
- Stipulations of fact;

- Unresolved scheduling issues;
- Contested issues on which the parties will submit briefs; and
- Any other matter that will simplify or expedite the arbitration.

(c) The panel will determine the time and place of any additional prehearing conferences. Prehearing conferences will generally be held by telephone. Unless the full panel is required under Rule 13503, prehearing conferences may be held before a single arbitrator, generally the chairperson.

**13502. Recording Prehearing Conferences**

(a) Prehearing conferences will not be recorded unless the panel determines otherwise, either on its own initiative or upon motion of a party.

(b) If a prehearing conference is recorded, it may be recorded using any of the methods discussed under Rule 13606. The Director will provide a copy of the recording to any party upon request for a nominal fee.

**13503. Motions**

**(a) Motions**

(1) A party may make motions in writing, or orally during any hearing session. Before making a motion, a party must make an effort to resolve the matter that is the subject of the motion with the other parties. Every motion, whether written or oral, must include a description of the efforts made by the moving party to resolve the matter before making the motion.

(2) Written motions are not required to be in any particular form, and may take the form of a letter, legal motion, or any other form that the panel decides is acceptable. Written motions must be served directly on each other party, at the same time and in the same manner. Written motions must also be filed with the Director, with additional copies for each arbitrator, at the same time and in the same manner in which they are served on the parties.

(3) Written motions must be served at least 20 days before a scheduled hearing, unless the panel decides otherwise.

(4) Motions to amend a pleading after panel appointment pursuant to Rule 13309(b) must be accompanied by copies of the proposed amended pleading when the motion is served on the other parties and filed with the Director. If the panel grants the motion, the amended pleading does not have to be served again, unless the panel determines otherwise. If a party moves to amend a pleading to add a party, the motion must be served on all parties, including the party to be added, and the party to be added may respond to the motion in accordance with Rule 13309(c) without waiving any rights or objections under the Code.

**(b) Responding to Motions**

Parties have 10 days from the receipt of a written motion to respond to the motion, unless the moving party agrees to an extension of time, or the Director or the panel decides otherwise. Responses to written motions must be served directly on each other party, at the same time and in the same manner. Responses to written motions must also be filed with the Director, with additional copies for each arbitrator, at the same time and in the same manner in which they are served on the parties.

**(c) Authority to Decide Motions**

(1) The Director decides motions relating to use of the forum under Rule 13203 and removal of an arbitrator under Rule 13410.

(2) Motions relating to combining or separating claims or arbitrations, or changing the hearing location, are decided by the Director before a panel is appointed, and by the panel after the panel is appointed.

(3) Discovery-related motions are decided by one arbitrator, generally the chairperson. The arbitrator may refer such motions to the full panel either at his or her own initiative, or at the request of a party. The arbitrator must refer motions relating to privilege to the full panel at the request of a party.

(4) Motions for arbitrator recusal under Rule 13409 are decided by the arbitrator who is the subject of the request.

(5) The full panel decides all other motions, including motions relating to the eligibility of a claim under Rule 13206, unless the Code provides or the parties agree otherwise.

**13504. Reserved.**

**13505. Cooperation of Parties in Discovery**

The parties must cooperate to the fullest extent practicable in the exchange of documents and information to expedite the arbitration.

**13506. Discovery Requests**

**(a) Requests for Documents or Information**

Parties may request documents or information from any party by serving a written request directly on the party. Requests for information are generally limited to identification of individuals, entities, and time periods related to the dispute; such requests should be reasonable in number and not require narrative answers or fact finding. Standard interrogatories are generally not permitted in arbitration.

**(b) Making Discovery Requests**

Discovery requests may be served:

- On the claimant, or any respondent named in the initial statement of claim, 45 days or more after the Director serves the statement of claim; and

- On any party subsequently added to the arbitration, 45 days or more after the statement of claim is served on that party.

At the same time, the party must serve copies of the request on all other parties. Any request for documents or information should be specific and relate to the matter in controversy.

**13507. Responding to Discovery Requests**

(a) Unless the parties agree otherwise, within 60 days from the date a discovery request is received, the party receiving the request must either:

- Produce the requested documents or information to all other parties;

- Identify and explain the reason that specific requested documents or information cannot be produced within the required time, and state when the documents will be produced; or

- Object as provided in Rule 13508.

(b) A party must act in good faith when complying with paragraph (a) of this rule. "Good faith" means that a party must use its best efforts to produce all documents required or agreed to be produced. If a document cannot be produced in the required time, a party must establish a reasonable timeframe to produce the document.

(c) If a party redacts any portion of a document prior to production, the redacted pages (or range of pages) shall be labeled "redacted."

**13508. Objecting to Discovery Requests; Waiver of Objection**

(a) If a party objects to producing any document or information requested under Rule 13506, it must specifically identify which document or requested information it is objecting to and why. Objections must be in writing, and must be served on all other parties at the same time and in the same manner. Objections should not be filed with the Director. Parties must produce all applicable listed documents, or other requested documents or information not specified in the objection.

(b) Any objection not made within the required time is waived unless the panel determines that the party had substantial justification for failing to make the objection within the required time.

(c) In making any rulings on objections, arbitrators may consider the relevance of documents or discovery requests and the relevant costs and burdens to parties to produce this information.

**13509. Motions to Compel Discovery**

(a) A party may make a motion asking the panel to order another party to produce documents or information if the other party has:

- Failed to comply with Rules 13506 or 13507; or
- Objected to the production of documents or information under Rule 13508.

(b) Motions to compel discovery must be made, and will be decided, in accordance with Rule 13503. Such motions must include the disputed document request, a copy of any objection thereto, and a description of the efforts of the moving party to resolve the issue before making the motion.

**13510. Depositions**

Depositions are strongly discouraged in arbitration. Upon motion of a party, the panel may permit depositions, but only under very limited circumstances, including:

- To preserve the testimony of ill or dying witnesses;
- To accommodate essential witnesses who are unable or unwilling to travel long distances for a hearing and may not otherwise be required to participate in the hearing;
- To expedite large or complex cases;
- In cases involving claims of statutory employment discrimination, if necessary and consistent with the expedited nature of arbitration; and
- If the panel determines that extraordinary circumstances exist.

**13511. Discovery Sanctions**

(a) Failure to cooperate in the exchange of documents and information as required under the Code may result in sanctions. The panel may issue sanctions against any party in accordance with Rule 13212(a) for:

- Failing to comply with the discovery provisions of the Code, unless the panel determines that there is substantial justification for the failure to comply; or
- Frivolously objecting to the production of requested documents or information.

(b) The panel may dismiss a claim, defense or proceeding with prejudice in accordance with Rule 13212(c) for intentional and material failure to comply with a discovery order of the panel if prior warnings or sanctions have proven ineffective.

**13512. Subpoenas**

(a) To the fullest extent possible, parties should produce documents and make witnesses available to each other without the use of subpoenas. Arbitrators shall have the authority to issue subpoenas for the production of documents or the appearance of witnesses.

(b) A party may make a written motion requesting that an arbitrator issue a subpoena to a party or a non-party. The motion must include a draft subpoena and must be filed with the Director, with an additional copy for the arbitrator. The requesting party must serve the motion and draft subpoena on each other party, at the same time and in the same manner as on the Director. The requesting party may not serve the motion or draft subpoena on a non-party.

(c) If a party receiving a motion and draft subpoena objects to the scope or propriety of the subpoena, that party shall, within 10 calendar days of service of the motion, file written objections with the Director, with an additional copy for the arbitrator, and shall serve copies on all other parties at the same time and in the same manner as on the Director. The party that requested the subpoena may respond to the objections within 10 calendar days of receipt of the objections. After considering all objections, the arbitrator responsible for deciding discovery-related motions shall rule promptly on the issuance and scope of the subpoena.

(d) If the arbitrator issues a subpoena, the party that requested the subpoena must serve the subpoena at the same time and in the same manner on all parties and, if applicable, on any non-party receiving the subpoena.

(e) Any party that receives documents in response to a subpoena served on a non-party shall provide notice to all other parties within five days of receipt of the documents. Thereafter, any party may request copies of such documents and, if such a request is made, the documents must be provided within 10 calendar days following receipt of the request.

**13513. Authority of Panel to Direct Appearances of Associated Person Witnesses and Production of Documents Without Subpoenas**

(a) Upon motion of a party, the panel may order the following without the use of subpoenas:

- The appearance of any employee or associated person of a member of NASD; or
- The production of any documents in the possession or control of such persons or members.

(b) Unless the panel directs otherwise, the party requesting the appearance of witnesses by, or the production of documents from, non-parties under this rule shall pay the reasonable costs of the appearance and/or production.

**13514. Exchange of Documents and Witness Lists Before Hearing**

**(a) Documents and Other Materials**

At least 20 days before the first scheduled hearing date, all parties must provide all other parties with copies of all documents and other materials in their possession or control that they intend to use at the hearing that have not already been produced. The parties should not file the documents with the Director or the arbitrators before the hearing.

**(b) Witness Lists**

At least 20 days before the first scheduled hearing date, all parties must provide each other party with the names and business affiliations of all witnesses they intend to present at the hearing. At the same time, all parties must file their witness lists with the Director, with enough copies for each arbitrator.

**(c) Exclusion of Documents or Witnesses**

Parties may not present any documents or other materials not produced and or any witnesses not identified in accordance with this rule at the hearing, unless the panel determines that good cause exists for the failure to produce the document or identify the witness. Good cause includes the need to use documents or call witnesses for rebuttal or impeachment purposes based on developments during the hearing. Documents and lists of witnesses in defense of a claim are not considered rebuttal or impeachment information and, therefore, must be exchanged by the parties.

## PART VI HEARINGS; EVIDENCE; CLOSING THE RECORD

### 13600. Required Hearings

(a) Hearings will be held, unless:

- The arbitration is administered under Rule 13800 or Rule 13801;
- The parties agree otherwise in writing; or
- The arbitration has been settled, withdrawn or dismissed.

(b) The panel will decide the time and date of the hearing at the initial prehearing conference or otherwise in another manner.

(c) The Director will notify the parties of the time and place at least 20 days before the hearing begins, unless the parties agree to a shorter time.

### 13601. Postponement of Hearings

**(a) Postponement of Hearings**

**(1) When a Hearing Shall Be Postponed**

A hearing shall be postponed by agreement of the parties.

**(2) When a Hearing May Be Postponed**

A hearing may be postponed:

- By the Director, in extraordinary circumstances;
- By the panel, in its own discretion; or
- By the panel, upon motion of a party. The panel may not grant a motion to postpone a hearing made within 10 days of the date that the hearing is scheduled to begin, unless the panel determines that good cause exists.

**(b) Postponement Fees**

(1) Except as otherwise provided, a postponement fee will be charged for each postponement agreed to by the parties, or granted upon request of one or more parties. The fee will equal the applicable hearing session fee under Rule 13902. The panel may allocate the fee among the party or parties that agreed to or requested the postponement. The panel may also assess part or all of any postponement fees against a party that did not request the postponement, if the panel determines that the non-requesting party caused or contributed to the need for the postponement. The panel may waive the fees.

(2) If a postponement request is made by one or more parties and granted within three business days before a scheduled hearing session, the party or parties making the request shall pay an additional fee of $100 per arbitrator. If more than one party requests the postponement, the arbitrators shall allocate the $100 per arbitrator fee among the requesting parties. The arbitrators may allocate all or portion of the $100 per arbitrator fee to the non-requesting party or parties, if the arbitrators determine that the non-requesting party or parties caused or contributed to the need for the postponement. In the event that a request results in the postponement of consecutively scheduled hearing sessions, the additional fee will be assessed only for the first of the consecutively scheduled hearing sessions. In the event that an extraordinary circumstance prevents a party or parties from making a timely postponement request, arbitrators may use their discretion to waive the fee, provided verification of such circumstance is received.

(3) No postponement fee will be charged if a hearing is postponed:

- Because the parties agree to submit the matter to mediation at NASD;
- By the panel in its own discretion; or
- By the Director in extraordinary circumstances.

**(c) Dismissal of Arbitration Due to Multiple Postponements**

If all parties jointly request, or agree to, more than two postponements, the panel may dismiss the arbitration without prejudice.

**13602. Attendance at Hearings**

The parties and their representatives are entitled to attend all hearings. Absent persuasive reasons to the contrary, expert witnesses should be permitted to attend all hearings. The panel will decide who else may attend any or all of the hearings.

**13603. Failure to Appear**

If a party fails to appear at a hearing after having been notified of the time, date and place of the hearing, the panel may determine that the hearing may go forward, and may render an award as though all parties had been present.

**13604. Evidence**

(a) The panel will decide what evidence to admit. The panel is not required to follow state or federal rules of evidence.

(b) Production of documents in discovery does not create a presumption that the documents are admissible at the hearing. A party may state objections to the introduction of any document as evidence at the hearing to the same extent that any other objection may be raised in arbitration.

**13605. Witness Oath**

All witnesses must testify under oath or affirmation.

**13606. Record of Proceedings**

**(a) Tape, Digital, or Other Recording**

(1) Except as provided in paragraph (b), the Director will make a tape, digital, or other recording of every hearing. The Director will provide a copy of the recording to any party upon request for a nominal fee.

(2) The panel may order the parties to provide a transcription of the recording. If the panel orders a transcription, copies of the transcription must be provided to each arbitrator and each party. The panel will determine which party or parties must pay the cost of making the transcription and copies.

(3) The recording is the official record of the proceeding, even if it is transcribed.

**(b) Stenographic Record**

(1) Any party may make a stenographic record of the hearing. Even if a stenographic record is made, the tape, digital, or other recording will be the official record of the proceeding, unless the panel determines otherwise. If the panel determines in advance that the stenographic record will be the official record, the Director will not record the hearing.

(2) If the stenographic record is the official record of the proceeding, a copy must be provided to the Director, each arbitrator, and each other party. The cost of making and copying the stenographic record will be borne by the party electing to make the stenographic record, unless the panel decides that one or more other parties should bear all or part of the costs.

**13607. Order of Presentation of Evidence and Arguments**

Generally, the claimant shall present its case, followed by the respondent's defense. The panel has the discretion to vary the order in which the hearing is conducted, provided that each party is given a fair opportunity to present its case.

**13608. Closing the Record**

(a) The panel will decide when the record is closed. Once the record is closed, no further submissions will be accepted from any party.

(b) In cases in which no hearing is held, the record is presumed to be closed when the Director sends the pleadings to the panel, unless the panel requests, or agrees to accept, additional submissions from any party. If so, the record is presumed to be closed when the last such submission is due.

(c) In cases in which a hearing is held, the panel will generally close the record at the end of the last hearing session, unless the panel requests, or agrees to accept, additional submissions from any party. If so, the panel will inform the parties when the submissions are due and when the record will close.

**13609. Reopening the Record**

The panel may reopen the record on its own initiative or upon motion of any party at any time before the award is rendered, unless prohibited by applicable law.

## PART VII TERMINATION OF AN ARBITRATION BEFORE AWARD

### 13700. Dismissal of Proceedings Prior to Award

(a) The panel must dismiss an arbitration or a claim at the joint request of the parties to that arbitration or claim. The dismissal will be with or without prejudice, depending on the request of the parties.

(b) The panel may dismiss a claim or an arbitration:

- Upon motion of a party under Rule 13206; or
- On its own initiative under Rule 13212(c) or Rule 13601(c).

### 13701. Settlement

(a) Parties to an arbitration may agree to settle their dispute at any time. Parties who settle must notify the Director. The Director will continue to administer the arbitration, and fees may continue to accrue, until the Director receives written notice of the settlement. The parties do not need to disclose the terms of the settlement agreement to the Director or to NASD Dispute Resolution, but members and associated persons may have reporting obligations under the rules of NASD.

(b) Settling parties will remain responsible for fees incurred under the Code. If parties to a settlement fail to agree on the allocation of any outstanding fees, those fees will be divided equally among the settling parties, except member surcharges and prehearing and hearing process fees required by the Code, which will remain the responsibility of the member party or parties.

### 13702. Withdrawal of Claims

(a) Before a claim has been answered by a party, the claimant may withdraw the claim against that party with or without prejudice.

(b) After a claim has been answered by a party, the claimant may only withdraw it against that party with prejudice unless the panel decides, or the claimant and that party agree, otherwise.

## PART VIII SIMPLIFIED ARBITRATION; DEFAULT PROCEEDINGS; STATUTORY EMPLOYMENT DISCRIMINATION CLAIMS; AND INJUNCTIVE RELIEF

### 13800. Simplified Arbitration

**(a) Applicability of Rule**

This rule applies to arbitrations involving $25,000 or less, exclusive of interest and expenses. Except as otherwise provided in this rule, all provisions of the Code apply to such arbitrations.

**(b) Single Arbitrator**

All arbitrations administered under this rule will be decided by a single arbitrator appointed from the NASD's chairperson roster in accordance with the Neutral List Selection System, unless the parties agree in writing otherwise.

**(c) Hearings**

(1) No hearing will be held in arbitrations administered under this rule unless the claimant requests a hearing.

(2) If no hearing is held,no i nitial prehearing conference or other prehearing conference will be held, and the arbitrator will render an award based on the pleadings and other materials submitted by the parties. If a hearing is held, the regular provisions of the Code relating to prehearings and hearings, including fee provisions, will apply.

**(d) Discovery and Additional Evidence**

The parties may request documents and other information from each other. All requests for the production of documents and other information must be served on all other parties, and filed with the Director, within 30 days from the date that the last answer is due. Any response or objection to a discovery request must be served on all other parties and filed with the Director within 10 days of the receipt of the requests. The arbitrator will resolve any discovery disputes.

**(e) Increases in Amount in Dispute**

If any pleading increases the amount in dispute to more than $25,000, the arbitration will no longer be administered under this rule, and the regular provisions of the Code will apply. If an arbitrator has been appointed, that arbitrator will remain on the panel. If a three-arbitrator panel is required or requested under Rule 13401, the remaining arbitrators will be appointed by the Director in accordance with Rule 13406(b). If no arbitrator has been appointed, the entire panel will be appointed in accordance with the Neutral List Selection System.

**(f) Arbitrator Honoraria**

NASD will pay the arbitrator an honorarium of $125 for each arbitration administered under this rule.

## 13801. Default Proceedings

### (a) Applicability of Rule

A claimant may request default proceedings against any respondent that falls within one of the following categories and fails to file an answer within the time provided by the Code.

- A member whose membership has been terminated, suspended, canceled, or revoked;
- A member that has been expelled from the NASD;
- A member that is otherwise defunct; or
- An associated person whose registration is terminated, revoked, or suspended.

### (b) Initiating Default Proceedings

(1) To initiate default proceedings against one or more respondents that fail to file a timely answer, the claimant must notify the Director in writing and must send a copy of the notification to all other parties at the same time and in the same manner as the notification was sent to the Director. If there is more than one claimant, all claimants must agree in writing to proceed under this rule against a defaulting respondent before this rule may be used.

(2) If the Director receives written notice from the claimant and determines that the requirements for proceeding under this rule have been met, the Director will:

- Notify all parties that the claim against the defaulting respondent will proceed under this rule; and
- Appoint a single arbitrator in accordance with the Neutral List Selection System to consider the statement of claim and other documents presented by the claimant.

### (c) Hearings

No hearing shall be held. The arbitrator may request additional information from the claimant before rendering an award.

### (d) Amendments to Increase Relief Requested

Claimants may not amend a claim to increase the relief requested from the defaulting respondent after the Director has notified the parties that the claim will proceed under this rule.

### (e) Awards

(1) The arbitrator may not issue an award based solely on the nonappearance of a party. Claimants must present a sufficient basis to support the making of an award. The arbitrator may not award damages in an amount greater than the damages

requested in the statement of claim, and may not award any other relief that was not requested in the statement of claim.

(2) The default award shall have no effect on any non-defaulting party.

**(f) Respondent's Answer**

If a defaulting respondent files an answer after the Director has notified the parties that the claim against that respondent will proceed under this rule but before an award has been issued, the proceedings against that respondent under this rule will be terminated and the claim against that respondent will proceed under the regular provisions in the Code.

**13802. Statutory Employment Discrimination Claims**

**(a) Applicability of Rule**

This rule applies to arbitrations involving a claim of statutory employment discrimination as defined in Rule 13100 (y). Except as otherwise provided in this rule, all provisions of the Code apply to such arbitrations.

**(b) Number of Arbitrators**

(1) Claims of $100,000 or Less

If the amount of a claim in a case involving an employment discrimination claim is $100,000 or less, the panel will consist of one arbitrator.

(2) Claims of More Than $100,000

If the amount of a claim in a case involving an employment discrimination claim is more than $100,000, the panel will consist of three arbitrators, unless the parties agree in writing to one arbitrator.

**(c) Composition of Panel**

(1) One Arbitrator

If the panel consists of one arbitrator, the arbitrator will be a public arbitrator who will meet the qualifications in paragraph (c)(3), unless the parties agree in writing otherwise.

(2) Three Arbitrators

If the panel consists of three arbitrators, the arbitrators will all be public arbitrators, one of whom will meet the qualifications in paragraph (c)(3), unless the parties agree in writing otherwise. The arbitrator who meets the criteria in paragraph (c)(3) will serve as chairperson of the panel.

(3) Special Statutory Discrimination Claim Qualifications

A single arbitrator or chairperson of a three-arbitrator panel in a case involving a statutory discrimination claim must have the following qualifications:

(A) law degree (Juris Doctor or equivalent);

(B) membership in the Bar of any jurisdiction;

(C) substantial familiarity with employment law; and

(D) ten or more years of legal experience, of which at least five years must be in either:

- law practice;
- law school teaching;
- government enforcement of equal employment opportunity statutes;
- experience as a judge, arbitrator, or mediator; or
- experience as an equal employment opportunity officer or in-house counsel of a corporation.

In addition, a chair or single arbitrator with the above experience may not have represented primarily the views of employers or of employees within the last five years. For purposes of this rule, the term "primarily" shall be interpreted to mean 50% or more of the arbitrator's business or professional activities within the last five years.

(4) Waiver of Special Qualifications

If all parties agree, after a dispute arises, they may waive any of the qualifications set forth in paragraph (A) or (B) above.

**(d) Fees**

(1) For any claim of statutory employment discrimination submitted to arbitration that is subject to a predispute arbitration agreement, a party who is a current or former associated person shall pay a non-refundable filing fee according to the schedule of fees set forth in Rule 13900(a), provided that:

(A) In no event shall such a person pay more than $200 for a filing fee; and

(B) A member that is a party to such an arbitration proceeding under this rule shall pay the remainder of all applicable arbitration fees set forth in Rules 13900, 13901, 13902(a), 13902(b) and 13903.

(2) The arbitration fees described in paragraph (1)(B) are not subject to allocation in the award. The panel, however, may assess to a party who is a current or former associated person those costs incurred under Rules 13502, 13510, 13512, 13513, 13524, 13601, and 13606.

**(e) Awards**

The panel may award any relief that would be available in court under the law. The panel must issue an award setting forth a summary of the issues, including the type(s) of dispute(s), the damages or other relief requested and awarded, a statement of any other issues resolved, and a statement regarding the disposition of any statutory claim(s).

**(f) Attorneys' Fees**

The panel may provide for reasonable attorneys' fee reimbursement, in whole or in part, as part of the remedy in accordance with applicable law.

**13803. Coordination of Statutory Employment Discrimination Claims Filed in Court and in Arbitration**

**(a) Option to Combine Related Claims in Court**

(1) (A) If a current or former associated person files a statutory discrimination claim in court against a member or its associated persons, and asserts related claims in arbitration at NASD against some or all of the same parties, a respondent who is named in both proceedings may, upon motion, compel the claimant to bring the related arbitration claims in the same court proceeding in which the statutory discrimination claim is pending, to the full extent to which the court will accept jurisdiction over the related claims.

(B) The respondent must notify the claimant in writing, before the respondent's time to answer has expired, that it is exercising this option and must file a copy of such notification with the Director. If the respondent files an answer without having exercised this option, it shall have waived its right to compel the claimant to assert related claims in court, except as provided in paragraph (b).

(2) (A) If a member or current or former associated person ("party") has a pending claim in arbitration against a current or former associated person and the current or former associated person thereafter asserts a related statutory discrimination claim in court against the party, the party shall have the option to assert its pending arbitration claims and any counterclaims in court.

(B) The party must notify the current or former associated person in writing, before filing an answer to the complaint in court, that it is exercising this option and must file a copy of such notification with the Director. If the party files an answer in court without having exercised this option, it shall have waived its right to assert the pending arbitration claim in court.

(C) The party may not exercise this option after the first hearing has begun on the arbitration claim.

**(b) Option Extended When Claim is Amended**

(1) If the claimant files an amended statement of claim adding new claims not asserted in the original statement of claim, a respondent named in the amended statement of claim may, upon motion, compel the claimant to assert all related claims in the same court proceeding in which the statutory discrimination claim is pending, to the full extent that the court will accept jurisdiction over the related claims, even if those related claims were asserted in the original statement of claim.

(2) The respondent must notify the claimant in writing, before the time to answer the amended statement of claim has expired, that it is exercising this option and must file a copy of such notification with the Director. If the respondent files an answer to the amended statement of claim without having exercised this option, it shall have waived its right to compel the claimant to assert related claims in court.

**(c) Requirement to Combine All Related Claims**

If a party elects to require a current or former associated person to assert all related claims in court, the party must assert in the same court proceeding all related claims that it has against the associated person to the full extent to which the court will accept jurisdiction over the related claims.

**(d) Right of Respondent to Remain in Arbitration**

(1) If there are multiple respondents and a respondent has exercised an option under paragraph (a) or (b), but another respondent wishes to have the claims against it remain in arbitration, then any remaining party may apply for a stay of the arbitration proceeding.

(2) If a panel has not been appointed, the Director will appoint a single arbitrator to consider the application for a stay. The single arbitrator shall be selected using the Neutral List Selection System and is not required to have the special employment arbitrator qualifications described in Rule 13801(c).

(3) If a panel has been appointed, the panel must stay the arbitration unless the panel determines that the stay would result in substantial prejudice to one or more of the parties.

**(e) Pre-Filing Certification**

(1) Before or at the same time that the statement of claim is filed, a claimant may file with the Director a certification that it communicated unsuccessfully with the respondent concerning the consolidation of all claims in court prior to filing a statement of claim, in an effort to save the expense of arbitration fees. A copy of such certification must be sent to the respondent at the same time and in the same manner as the filing with the Director.

(2) If, after a certification has been filed, all the respondents later exercise the option to consolidate all claims in court, the Director will return the claimant's filing fee, but will retain the member surcharge and any accrued member process fees. If there

are any remaining respondents, the filing fee will be adjusted to correspond to the claims against the remaining respondents.

**(f) Motion to Compel Arbitration**

If a member or a current or former associated person files in court a claim against a member or a current or former associated person that includes matters that are subject to mandatory arbitration, either by the rules of NASD or by private agreement, the defending party may, upon motion, compel arbitration of the claims that are subject to mandatory arbitration.

**13804. Temporary Injunctive Orders; Requests for Permanent Injunctive Relief**

**(a) Temporary Injunctive Orders**

(1) In industry or clearing disputes required to be submitted to arbitration under the Code, parties may seek a temporary injunctive order from a court of competent jurisdiction. Parties to a pending arbitration may seek a temporary injunctive order from a court of competent jurisdiction even if another party has already filed a claim arising from the same dispute in arbitration pursuant to this paragraph, provided that an arbitration hearing on a request for permanent injunctive relief pursuant to paragraph (b) of this rule has not yet begun.

(2) A party seeking a temporary injunctive order from a court with respect to an industry or clearing dispute required to be submitted to arbitration under the Code must, at the same time, file with the Director a statement of claim requesting permanent injunctive and all other relief with respect to the same dispute in the manner specified under the Code. The party seeking temporary injunctive relief must also serve the statement of claim requesting permanent injunctive and all other relief on all other parties in the same manner and at the same time as the statement of claim is filed with the Director.

(3) Filings and service under this rule must be made by facsimile, overnight delivery service or messenger. Service must be made on all parties at the same time and in the same manner, unless the parties agree otherwise. A party obtaining a court-issued temporary injunctive order must notify the Director and the other parties of the issuance of the order within one business day.

**(b) Hearing on Request for Permanent Injunctive Relief**

(1) Scheduling of Hearing

If a court issues a temporary injunctive order, an arbitration hearing on the request for permanent injunctive relief will begin within 15 days of the date the court issues the temporary injunctive order. If the 15th day falls on a Saturday, Sunday, or NASD holiday, the 15-day period shall expire on the next business day. Unless the parties agree otherwise, a hearing lasting more than one day will be held on consecutive days when reasonably possible. The Director will provide to all parties notice of the date, time and place of the hearing at least three days prior to the beginning of the hearing.

(2) Composition of Arbitration Panel

The hearing on the request for permanent injunctive relief will be heard by a panel of three arbitrators. The composition of the panel will be determined in accordance with Rule 13402.

(3) Selection of Arbitrators and Chairperson

(A)

(i) In cases in which all of the members of the panel are non-public, the Director will generate and provide to the parties a list of seven arbitrators from NASD's roster of non-public arbitrators. The Director will send to the parties the employment history for the past 10 years for each listed arbitrator and other background information. At least three of the arbitrators listed shall be lawyers with experience litigating cases involving injunctive relief.

(ii) Each party may exercise one strike to the arbitrators on the list. Within three days of receiving the list, each party shall inform the Director which arbitrator, if any, it wishes to strike, and shall rank the remaining arbitrators in order of preference. The Direct shall consolidate the parties' rankings, and shall appoint arbitrators based on the order of rankings on the consolidated list, subject to the arbitrators' availability and disqualification.

(B)

(i) In cases in which the panel consists of a majority of public arbitrators, the Director will generate and provide to the parties a list of nine arbitrators from NASD's roster of arbitrators. The Director shall send to the parties employment history for the past 10 years for each listed arbitrator and other background information. At least a majority of the arbitrators listed shall be public arbitrators, and at least four of the arbitrators listed shall be lawyers with experience litigating cases involving injunctive relief.

(ii) Each party may exercise two strikes to the arbitrators on the list. Within three days of receiving the list, each party shall inform the Director which arbitrators, if any, it wishes to strike, and shall rank the remaining arbitrators in order of preference. The Director will combine the parties' rankings, and will appoint arbitrators based on the order of rankings on the combined list, subject to the arbitrators' availability and disqualification.

(C)

(i) Each party must inform the Director of its preference of chairperson of the panel by the close of business on the next business day after receiving notice of the panel members.

(ii) If the parties do not agree on a chairperson within that time, the Director shall select the chairperson. In cases in which the panel consists of a majority of public arbitrators, the Director will select a public arbitrator as chairperson. Whenever possible, the Director will select as chairperson the lawyer with experience litigating cases involving injunctive relief whom the parties have ranked the highest.

(D) The Director may exercise discretionary authority and make any decision that is consistent with the purposes of this rule and the Code to facilitate the appointment of panels and the selection of chairperson.

(4) Applicable Legal Standard

The legal standard for granting or denying a request for permanent injunctive relief is that of the state where the events upon which the request is based occurred, or as specified in an enforceable choice of law agreement between the parties.

(5) Effect of Pending Temporary Injunctive Order

Upon a full and fair presentation of the evidence from all relevant parties on the request for permanent injunctive relief, the panel may prohibit the parties from seeking an extension of any court-issued temporary injunctive order remaining in effect, or, if appropriate, order the parties jointly to move to modify or dissolve any such order. In the event that a panel's order conflicts with a pending court order, the panel's order will become effective upon expiration of the pending court order.

(6) Fees, Costs and Expenses, and Arbitrator Honorarium

(A) The parties shall jointly bear reasonable travel-related costs and expenses incurred by arbitrators who are required to travel to a hearing location other than their primary hearing location(s) in order to participate in the hearing on the request for permanent injunctive relief. The panel may reallocate such costs and expenses among the parties in the award.

(B) Each party seeking a temporary injunctive order in court pursuant to this rule must pay a non-refundable surcharge of $2,500 at the time the party files its statement of claim and request for permanent injunctive relief. In the award, the panel may decide that one or more parties must reimburse a party for part or all of the surcharge. The surcharge is in addition to all other non-refundable filing fees or costs that are required under the Code.

(C) Notwithstanding any other provision in the Code, the chairperson of the panel hearing a request for permanent injunctive relief pursuant to this rule shall receive an honorarium of $375 for each single session, and $700 for each double session, of the hearing. Each other member of the panel shall receive an honorarium of $300 for each single session, and $600 for each double session, of the hearing. The parties shall equally pay the difference between these amounts and the amounts panel members and the chairperson receive under the Code pursuant to Rule 13214. The panel may reallocate such amount among the parties in the award.

**(c) Hearing on Damages or Other Relief**

(1) Upon completion of the hearing on the request for permanent relief, the panel may, if necessary, set a date for any subsequent hearing on damages or other relief, which shall be held before the same panel and which shall include, but not be limited to, the same record.

(2) The parties shall jointly bear reasonable travel-related costs and expenses incurred by arbitrators who are required to travel to a hearing location other than their primary hearing location(s) in order to participate in any subsequent hearings on damages or other relief. The panel may reallocate such costs and expenses among the parties in the award.

## PART IX FEES AND AWARDS

### 13900. Fees Due When a Claim Is Filed

**(a) Fees for Claims Filed by Associated Persons**

(1) Associated persons who file a claim, counterclaim, cross claim or third party claim must pay a filing fee in the amount indicated in the schedule below. The Director may defer payment of all or part of the filing fee on a showing of financial hardship. If payment of the fee is not deferred, failure to pay the required amount will result in a deficiency under Rule 13307.

**Filing Fees for Claims Filed by Associated Persons**

| **Amount of Claim (exclusive of interest and expenses)** | **Filing Fee** |
|---|---|
| $.01 to $1,000 | $50 |
| $1,000.01 to $2,500 | $75 |
| $2,500.01 to $5,000 | $175 |
| $5,000.01 to $10,000 | $325 |
| $10,000.01 to $25,000 | $425 |
| $25,000.01 to $50,000 | $600 |
| $50,000.01 to $100,000 | $975 |
| $100,000.01 to $500,000 | $1,425 |
| $500,000.01 to $1 million | $1,575 |
| Over $1 million | $1,800 |
| Non-Monetary/Not Specified | $1,250 |

(2) If the claim does not request or specify money damages, the Director may determine that the filing fee should be more or less than the amount specified in the schedule above, but in any event, the amount of the filing fee may not be less than $50 or more than $1,800.

**(b) Fees for Claims Filed by Members**

(1) Members filing a claim, counterclaim, cross claim, or third party claim must pay a filing fee in the amount indicated in the schedule below. Failure to pay the required amount will result in a deficiency under Rule 13307.

**Filing Fees for Claims Filed by Members**

| **Amount of Claim** (exclusive of interest and expenses) | **Filing Fee** |
|---|---|
| $.01 to $1,000 | $225 |
| $1,000.01 to $2,500 | $350 |
| $2,500.01 to $5,000 | $525 |
| $5,000.01 to $10,000 | $750 |
| $10,000.01 to $25,000 | $1,050 |
| $25,000.01 to $50,000 | $1,450 |
| $50,000.01 to $100,000 | $1,750 |
| $100,000.01 to $500,000 | $2,125 |
| $500,000.01 to $1,000,000 | $2,450 |
| $1,000,000.01 to $5,000,000 | $3,200 |
| Over $5,000,000 | $3,700 |
| Non-Monetary/Not Specified | $1,500 |

(2) If the claim does not request or specify money damages, the Director may determine that the filing fee should be more or less than the amount specified in the schedule above, but in any event, the filing fee may not be less than $225 or more than $3,700.

**(c) Partial Refund of Filing Fee**

(1) If a claim is settled or withdrawn more than 10 days before the date that the hearing on the merits under Rule 13600 is scheduled to begin, a party paying a filing fee will receive a partial refund of the filing fee in the amount indicated in the schedule below, less any other fees or costs assessed against the party under the Code, including any hearing session fees assessed under Rule 13902. No refund will be paid if the NASD receives notice that a claim is settled or withdrawn within 10 days of the date that the hearing on the merits under Rule 13600 is scheduled to begin.

**Partial Refund for Settlement or Withdrawal More Than 10 Days Before Hearing on the Merits**

| Amount of Claim (exclusive of interest and expenses) | Refund |
|---|---|
| $.01 to $1,000 | $25 |
| $1,000.01 to $2,500 | $50 |
| $2,500.01 to $5,000 | $125 |
| $5,000.01 to $10,000 | $250 |
| $10,000.01 to $25,000 | $300 |
| $25,000.01 to $50,000 | $450 |
| $50,000.01 to $100,000 | $750 |
| $100,000.01 to $500,000 | $1,125 |
| Over $500,000 | $1,200 |
| Non-monetary/Not specified | $1,000 |

(2) If the claim does not request or specify money damages, and the Director determines that the hearing session fee should be a different amount than the amount specified in the schedule in Rule 13902, the amount of the refund will be the amount of the hearing session fee determined by the Director, less any fees or costs assessed against the party under the Code, including any hearing session fees assessed under Rule 13902.

**(d) Reimbursement of Filing Fees**

In the award, the panel may order a party to reimburse another party for all or part of any filing fee paid.

**13901. Member Surcharge**

(a) A surcharge in the amount indicated in the schedule below will be assessed against each member that:

- Files a claim, counterclaim, cross claim, or third party claim under the Code;
- Is named as a respondent in a claim, counterclaim, cross claim, or third party claim filed and served under the Code; or
- Employed, at the time the dispute arose, an associated person who is named as a respondent in a claim, counterclaim, cross claim, or third party claim filed and served under the Code.

**Member Surcharge**

| Amount in Dispute (exclusive of interest and expenses) | Surcharge |
|---|---|
| Up to $2,500 | $150 |
| $2,500.01 - $5,000 | $200 |
| $5,000.01 - $10,000 | $325 |
| $10,000.01 - $25,000 | $425 |
| $25,000.01 - $30,000 | $600 |
| $30,000.01 - $50,000 | $875 |
| $50,000.01 - $100,000 | $1,100 |
| $100,000.01 - $500,000 | $1,700 |
| $500,000.01 - $1,000,000 | $2,250 |
| $1,000,000.01 - $5,000,000 | $2,800 |
| $5,000,000.01 - $10,000,000 | $3,350 |
| Over $10,000,000 | $3,750 |
| Non-Monetary/Not Specified | $1,500 |

(b) If the claim does not request or specify money damages, the Director may determine that the member surcharge should be more or less than the amount specified in the schedule above, but in any event the amount of the member surcharge may not be less than $150 or more than $3,750.

(c) If the claim is filed by the member, the surcharge is due when the claim is filed. If the claim is filed against the member, or against an associated person employed by the member at the time of the events giving rise to the dispute, the surcharge is due when the claim is served in accordance with Rule 13300.

(d) No member shall be assessed more than a single surcharge in any arbitration. The panel may not reallocate a surcharge paid by a member to any other party.

(e) The Director may also refund or waive the member surcharge in extraordinary circumstances.

**13902. Hearing Session Fees, and Other Costs and Expenses**

**(a) Hearing Session Fees**

(1) Hearing session fees will be charged for each hearing session. The total amount chargeable to the parties for each hearing session is based on the amount in dispute, as specified in the schedule below. In the award, the panel will determine the amount of each hearing session fee that each party must pay.

**Hearing Session Fees**

| Amount of Claim | Hearing Session W/ One Arbitrator | Hearing Session W/ Three Arbitrators |
|---|---|---|
| Up to $2,500 | $50 | N/A |
| $2,500.01 to $5,000 | $125 | N/A |
| $5,000.01 to $10,000 | $250 | N/A |
| $10,000.01 to $25,000 | $450 | N/A |
| $25,000.01 to $50,000 | $450 | $600 |
| $50,000.01 to $100,000 | $450 | $750 |
| $100,000.01 to $500,000 | $450 | $1,125 |
| Over $500,000 | $450 | $1,200 |
| Unspecified Damages | N/A | $1,000 |

(2) If the claim does not request or specify money damages, the Director may determine that the hearing session fee should be more or less than the amount specified in the schedule above, but in any event the hearing session fee shall not be less than $50 or more than $1,200 for each hearing session.

(3) If there is more than one claim in a proceeding, the amount of hearing session fees will be based on the largest claim in the proceeding. If any claims are joined or combined under Rules 13312, 13313, or 13314, the amount of those claims will be aggregated and they will be treated as one claim for purposes of this paragraph.

**(b) Payment of Hearing Session Fees**

(1) The panel may assess the hearing session fees in the award, or may require the parties to pay hearing session fees during the course of the arbitration. The total amount that the panel may require the parties to pay for each hearing session during the course of an arbitration may not exceed the total amount chargeable to the parties for each hearing session under the schedule to paragraph (a) of this rule.

(2) Any interim hearing session fee payments made by a party under this rule will be deducted from the total amount of hearing session fees assessed against that party in the award. If the amount of interim payments is more than the amount assessed against the party in the award, the balance will be refunded to that party.

(3) In the award, the amount of one hearing session fee will be deducted from the total amount of hearing session fees assessed against the party who paid the filing fee. If this amount is more than any fees, costs, and expenses assessed against this party under the Code, the balance will be refunded to the party.

**(c) Assessment of Other Costs and Expenses in Award**

In its award, the panel must also determine the amount of any costs and expenses incurred by the parties under the Code or that are within the scope of the agreement of the parties, and which party or parties will pay those costs and expenses.

**(d) Assessment of Hearing Session Fees, Costs, and Expenses in Case of Settlement or Withdrawal**

If a claim is settled or withdrawn:

- The parties will be subject to an assessment of hearing session fees for hearing sessions already held.
- If NASD receives a settlement or withdrawal notice 10 days or fewer prior to the date that the hearing on the merits under Rule 13600 is scheduled to begin, parties that paid a filing fee under Rule 13900 will not be entitled to any refund of the filing fee.
- The parties will also be responsible for any fee or costs incurred under Rules 13502, 13513, 13601, or 13606 in connection with such hearings. If a case is settled or withdrawn and the parties' agreement fails to allocate such fees and costs, the fees and costs will be allocated as provided by Rule 13701(b).

**(e) Refund Payments**

Any refunds of fees or costs incurred under the Code will be paid directly to the named parties, even if a non-party made a payment on behalf of the named parties.

**13903. Process Fees Paid by Members**

(a) Each member that is a party to an arbitration in which more than $25,000, exclusive of interest and expenses, is in dispute must pay:

- A non-refundable prehearing process fee of $750, due at the time the parties are sent arbitrator lists in accordance with Rule 13403(b); and
- A non-refundable hearing process fee, due when the parties are notified of the date and location of the hearing on the merits under Rule 13600, as set forth in the schedule below.

**Hearing Process Fee Schedule**

| **Amount of Claim** (exclusive of interest and expenses) | **Hearing Process Fee** |
|---|---|
| $1 - $25,000 | $0 |
| $25,000.01 - $50,000 | $1,000 |
| $50,000.01 - $100,000 | $1,700 |
| $100,000.01 - $500,000 | $2,750 |
| $500,000.01 - $1,000,000 | $4,000 |
| $1,000,000.01 - $5,000,000 | $5,000 |
| More than $5,000,000 | $5,500 |
| Non-Monetary/Not Specified | $2,200 |

(b) If an associated person of a member is a party, the member that employed the associated person at the time the dispute arose will be charged the process fees, even if the member is not a party. No member shall be assessed more than one prehearing and one hearing process fee in any arbitration.

(c) The panel may not reallocate to any other party any prehearing and hearing process fees paid by a member.

**13904. Awards**

(a) All awards shall be in writing and signed by a majority of the arbitrators or as required by applicable law. Such awards may be entered as a judgment in any court of competent jurisdiction.

(b) Unless the applicable law directs otherwise, all awards rendered under the Code are final and are not subject to review or appeal.

(c) The Director will serve a copy of the award on each party or the representative of the party. The Director will serve the award by using any method available and convenient to the parties and the Director, and that is reasonably expected to cause the award to be delivered to all parties, or their representative, on the same day. Methods the Director may use include, but are not limited to, first class, registered or certified mail, hand delivery, and facsimile or other electronic transmission.

(d) The panel shall endeavor to render an award within 30 business days from the date the record is closed.

(e) The award shall contain the following:

- The names of the parties;
- The name of the parties' representatives, if any;
- An acknowledgement by the arbitrators that they have each read the pleadings and other materials filed by the parties;
- A summary of the issues, including the type(s) of any security or product, in controversy;
- The damages and other relief requested;
- The damages and other relief awarded;
- A statement of any other issues resolved;
- The allocation of forum fees and any other fees allocable by the panel;
- The names of the arbitrators;

- The dates the claim was filed and the award rendered;
- The number and dates of hearing sessions;
- The location of the hearings; and
- The signatures of the arbitrators.

(f) The award may contain a rationale underlying the award.

(g) All awards shall be made publicly available.

(h) Fees and assessments imposed by the arbitrators under the Code shall be paid immediately upon the receipt of the award by the parties. Payment of such fees shall not be deemed ratification of the award by the parties.

(i) All monetary awards shall be paid within 30 days of receipt unless a motion to vacate has been filed with a court of competent jurisdiction. An award shall bear interest from the date of the award:

- If not paid within 30 days of receipt;
- If the award is the subject of a motion to vacate which is denied; or
- As specified by the panel in the award.

Interest shall be assessed at the legal rate, if any, then prevailing in the state where the award was rendered, or at a rate set by the arbitrator(s).